Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

EVANDRO S. SANTINI, *et al.*,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court, adjudicating an inverse condemnation claim that a property owner has brought in that court under a state law provision because a Fifth Amendment takings claim is not yet ripe under this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, must nonetheless adhere to the standards established by this Court's decisions interpreting the Takings Clause of the Fifth Amendment, and may not fashion its own, contrary takings standards.

2. Whether the Connecticut Supreme Court, adjudicating a claim that a state agency economically idled for two years property on which a subdivision was being built by designating that land as a low-level radioactive waste disposal facility, violated the Takings Clause of the Fifth Amendment by dismissing as "irrelevant" the standards established by this Court in *Penn Central Transportation Co. v. New York City*, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, and *Lucas v. South Carolina Coastal Council*, and by holding that because the agency never demonstrated a "fixed and irreversible intent" to condemn, its action was "mere government planning" and could never be a temporary taking as a matter of law.

PARTIES TO THE PROCEEDING

The parties to this case are:

Plaintiffs/Petitioners: Evandro S. Santini
Alfred Drive
Tolland, Connecticut 06084

Santini Homes, Inc.
1031 Hartford Turnpike
Vernon, Connecticut 06066-4407

Defendant/Respondent: Connecticut Hazardous Waste Management Service
50 Columbus Boulevard
Fourth Floor
Hartford, Connecticut 06106

A brief *amici curiae* was filed by the Connecticut Business and Industry Association, the Connecticut Association of Realtors, and the Home Builders Association of Connecticut in support of the plaintiffs/petitioners. A brief *amici curiae* in support of the defendant/respondent was filed by the Connecticut Attorney General's office on behalf of the Connecticut Department of Transportation, and the Department of Economic and Community Development.

RULE 29.6 STATEMENT

Santini Homes, Inc. is a closely-held corporation, and has no parent or subsidiary corporations.

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PETITION FOR A WRIT OF CERTIORARI

Evandro S. Santini, of Tolland, Connecticut, and Santini Homes, Inc., of Vernon, Connecticut, respectfully petition this Court for a writ of certiorari to review the judgment of the Connecticut Supreme Court in this case.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court, and the dissenting opinions of Justices Berdon and McDonald, are reported at 251 Conn. 121, 739 A.2d 680 (1999) and are reprinted in the appendix hereto ("App.") at 1a. The opinion of the Connecticut Superior Court is not officially published but can be found at 1998 WL 422166 (1998), and is reprinted at App. 39a.

JURISDICTION

The opinion of the Connecticut Supreme Court was published on November 9, 1999. A timely Motion for Reconsideration and Reargument was denied on December 13, 1999. App. 54a. On February 28, 2000, this Court granted an extension of time within which to file this petition to March 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides: "[N]or shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the U.S. Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The Takings Clause of the Connecticut Constitution, Article First, §11, provides: "The property of no person shall be taken for public use, without just compensation therefor."

INTRODUCTION

This petition raises the issue of whether state courts must adhere to the tests and standards established by this Court under the Takings Clause of the Fifth Amendment when they adjudicate takings claims against states and localities that have been brought under state law provisions because, under this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), a Fifth Amendment takings claim is not yet ripe.

It is well-established that the Fifth Amendment Takings Clause applies to the states through the Fourteenth Amendment, and that the U.S. Constitution's Bill of Rights defines a national, minimum standard for the protection of individual rights. Yet in this case a majority of the Connecticut Supreme Court, addressing an inverse condemnation claim brought in state court under a state constitutional provision as required by *Williamson County*, dismissed the entirety of this Court's takings decisions as "irrelevant" to its analysis and fashioned several standards that plainly conflict with this Court's takings jurisprudence and provide less protection of individual rights than is required by the federal Takings Clause. This rejection of, or lack of adherence to, federal takings standards has occurred in other states,

and thus the decision below also exemplifies a conflict between this Court and several state courts. On the other hand, some state courts have expressly recognized the applicability of Fifth Amendment standards, and thus there is also a conflict among the state courts. Meanwhile, in light of the issue presented here, lower federal courts have expressed uncertainty about the preclusive effects of state court proceedings on subsequent federal takings claims.

That the Connecticut Supreme Court and other state courts have felt empowered to disregard Fifth Amendment standards while other courts have adhered to them illuminates a substantial disagreement about the role of the Fifth Amendment Takings Clause within the U.S. Bill of Rights and our federal system. This conflict merits this Court's attention because, as explained below, in *Williamson County* and its progeny, this Court and the lower federal courts have effectively rendered state courts as the exclusive, not just primary, forum for adjudication of these constitutional claims. If the decision below and its analysis stand, this case portends a class of takings cases in which property owners will *never* be able to avail themselves of rights guaranteed to them by the U.S. Constitution.

The petitioners thus respectfully submit that resolving the issue left open in *Williamson County* about whether Fifth Amendment takings standards apply to taking claims litigated in state courts under state law provisions will (1) resolve a conflict between several states and this Court; (2) resolve a conflict among state courts; (3) resolve, at least in part, confusion in the federal courts about the *res judicata* and collateral estoppel effects of prior state court proceedings; (4) diminish the number of Fifth Amendment takings claims brought in federal

courts subsequent to state proceedings; (5) further clarify the position of the Fifth Amendment Takings Clause within the U.S. Bill of Rights and our federal system; and (6) ensure that property owners and businesses across the country are afforded judicial consideration of the rights granted by the federal Takings Clause.

STATEMENT OF THE CASE

1. Evandro S. Santini has built single-family homes and apartments for 30 years in the eastern suburbs of Hartford, Connecticut. After immigrating to the United States in 1957 at age 17, he served several apprenticeships in the building trades. He founded plaintiff Santini Homes, Inc. ("SHI"), the construction arm of his business, in 1970, and has been its president and treasurer ever since.

From 1984 through 1991, Santini and SHI (hereinafter "Santini") developed the first phase of a residential subdivision on 74 acres in Ellington, Connecticut, 20 miles northeast of Hartford. This effort began when Santini purchased 20 acres in 1984 for $147,500. In January 1985, he obtained all necessary permits for a 16 lot subdivision on this parcel, called "Ellridge Estates." Santini installed the subdivision's infrastructure in the summer of 1985 at a cost of more than $500,000. In March 1988, Santini purchased an adjoining 54 acre parcel for $1,075,000. With this second parcel, he had in place the land for his overall plan, which was to construct larger homes on the 16 lots and develop the remaining 54 acres with smaller lots and more modest homes. Neither parcel contains wetlands, watercourses, or other environmental resources that might restrict development.

Santini began construction of model homes in Ellridge Estates in 1987. The work proceeded slowly

because Santini was completing another development and the real estate recession of 1987-91 had taken hold in New England. Santini, therefore, assembled financing, equipment, and personnel, completed model homes, undertook preliminary engineering on the 54 acre parcel, and awaited an upturn in the market. By 1991, Santini had invested $5 million of his own money and had borrowed $4.7 million specifically for the Ellington project.

In mid-1991, the upturn in the market commenced. Santini was well-positioned to take advantage. One of his lenders established a mortgage loan program with favorable terms for prospective buyers within Ellridge Estates. Santini responded to market conditions by lowering prices, increasing amenity packages, and aggressively advertising. By early June, he had identified buyers for two homes.

2. The Connecticut Hazardous Waste Management Service ("Service" or "agency") is "a public instrumentality and political subdivision" of the State. *See* Conn. Gen. Stat. §22a-134bb(a) (1999). The Service's principal duty is to oversee the handling and disposal of radioactive materials, including the identification, acquisition, and construction of an in-state disposal facility. *See id.* §§22a-163c *et seq.*

Connecticut's mandate to the Service to acquire an in-state disposal site was the direct result of a federal requirement to development new state or regional disposal facilities. *See* Pub. L. No. 96-573, 94 Stat. 3347 (1980), codified at 42 U.S.C. §§2021b *et seq.* This mandate was accompanied by the threatened imposition of severe financial penalties on any state that did not meet certain deadlines. Connecticut adopted facility development legislation principally in 1987, Public Act 87-540. The Service then commenced its site selection process.

At the trial in this case, the Service's witnesses described the high cost and uncertain availability of out-of-state disposal facilities; the corporations, utility companies, and educational institutions that generate most of Connecticut's low-level waste and thus would be the principal beneficiaries of an in-state facility; and the public safety concerns attendant to long-term storage of radioactive waste at in-state sites. This evidence was undisputed.

It was also undisputed that the agency's site selection process was conducted in secret. App. 15a. Santini, therefore, had no notice that his property was being secretly targeted for public use.

On June 10, 1991, the agency announced that the land on which the Santini subdivision was being constructed was one of three finalist sites for the disposal facility. On June 30, 1991, a map of the Ellridge Estates development appeared on the front page of the *Hartford Courant,* next to the international symbol for radioactivity. In late 1991, one of the two other sites was eliminated from consideration.

Residents and public officials in Ellington and surrounding towns reacted angrily to the June 1991 announcement. In January 1992, in response to this public outcry, Governor Weicker proposed revocation of the requirement that the agency condemn a disposal site, in favor of a voluntary process. The legislature adopted the revocation in April, and the Governor signed it on May 5, 1992, Public Act 92-45.[1] *Id.*, at 16a.

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[1] Later in 1992, this Court, in *New York v. United States,* 505 U.S. 144, invalidated the federal law requiring states to "take title" to radioactive waste for which they had no in-state disposal site.

3. Santini brought a temporary taking claim in 1994. Because *Williamson County* holds that a Fifth Amendment taking claim is not ripe until a property owner has sought and been denied just compensation in the state system, Santini sued in state court and sought just compensation under a state law provision, the takings clause of the Connecticut Constitution. Santini alleged that the agency's action had "economically idled" his property. In the alternative, he asserted that in order to benefit in-state generators of low-level radioactive waste and to address a public safety issue, the Service had saddled him with an enormous financial burden that should have been borne by the State as a whole. While pleading under the state constitution, Santini *expressly argued* throughout the case that the Connecticut courts, when interpreting the state's takings clause, must afford no less protection than is granted by the Takings Clause of the U.S. Constitution, by utilizing the tests and standards fashioned by this Court under the Fifth Amendment in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978), *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

4. At trial, all of the expert and fact witnesses agreed that in the wake of the June 1991 announcement, Santini could not generate *any* revenue from his land or development. The market for the homes and lots became, in the words of one expert, "dysfunctional"; there were simply no willing buyers to complete the equation that creates a market. Santini's appraisal witness concluded that the property's value on June 10, 1991 was $2.6 million, but that after the designation this value "effectively vanished" for at least 24 months. App. 29a-31a, nn. 3, 4 (dissent of Berdon, J.). The appraiser retained

by the Service *concurred* with Santini's appraiser, stating in his report:

> The June 10, 1991 designation of the Santini properties in Ellington as being part of, or immediately adjacent to, a potential site for a low-level radioactive waste disposal facility in Connecticut lasted for 11 months, until May 1992. During that period of time, no sales of any portion of Ellridge Estates (vacant lots within the designated site areas of the facility, or vacant houses immediately abutting the designated site area) could reasonably be expected to have occurred. Moreover, no development activity on the [54 acre] Pinney Street property could reasonably have been expected to occur. Action(s) to obtain a change in zoning or a subdivision Plan approval would likely have been precluded as well. . . .
>
> [We] recognize that the announcement by CHWMS effectively halted any reasonable marketing or development efforts on the part of Santini, as long as the designation as a potential site for the low-level radioactive waste disposal facility was in effect. . . . [We] have concluded that the most likely start-up date for effective marketing and sales in the three segments of the Santini properties in Ellington would be June 1993. That is the end of the second quarter of 1993, and 24 months from the CHWMS announcement date.

See id.

Under the local zoning regulations in effect between 1991-93, the only permitted use of the Santini property other than single-family residential was agriculture. At trial, an agricultural appraiser testified that the subject property had no value for agricultural use.

5. The Connecticut Superior Court, in a decision issued July 13, 1998, App. 39a, acknowledged that after the

June 1991 siting designation, "[t]he plaintiffs were unable to proceed with residential development" and Santini and his company "could not generate funds to pay down their debts. . . ." *Id.* at 44a. It agreed that Santini had suffered a $715,000 loss of value, *id.*, but did not state its opinion as to the "before" value against which to measure this loss, and thus did not identify a percentage diminution. The trial court further held that Santini could not claim a taking as a matter of law because the June 1991 designation was part of the State's planning process, and a taking cannot occur unless "the State's intent to condemn the property in question has become fixed and irreversible," which it found had not happened. *Id.* at 50a.

On November 17, 1998, the trial court issued an articulation. It explained that, in analyzing the taking claim, the economic impact of the State's action should be balanced not against any harm resulting from Santini's use of his land, but against the danger of exposing the public to radioactive materials. *Id.* at 53a.

6. On appeal, Santini reiterated that decisions of this Court furnish minimum, national standards for the adjudication of takings claims brought under state law procedures. In particular, Santini discussed in detail in his appellate briefs that (1) the Connecticut Supreme Court had not, since this Court's *Penn Central* decision in 1978, revisited the consistency of its takings decisions with federal law; (2) federal constitutional standards had further evolved since *Penn Central,* particularly in *First English* (1987) and *Lucas* (1992); and (3) this case therefore required the state court to re-examine its takings jurisprudence in order to make it consistent with decisions of this Court. In addition, the Connecticut Business and Industry Association, the Connecticut Association of

Realtors, and the Home Builders Association of Connecticut filed a brief *amici curiae* that was devoted entirely to explaining how the criteria established in the 1960's and 1970's for Connecticut's two tests for a taking, "practical confiscation" and "balancing," now failed to conform, among other things, to the three-factor test set forth in *Penn Central*, the recognition of temporary takings in *First English*, or the categorical formulation of *Lucas* regarding loss of economic use.[2] Thus, the question of federal constitutional law presented in this petition was squarely raised below.

And squarely rejected. In its first sentence, the Connecticut Supreme Court framed the dispositive issue as "whether mere government planning may constitute a taking, in the form of an inverse condemnation. . . ." App. 2a; *see also id.* at 18a. After reviewing the history of the agency's legislative mandate to condemn an in-state radioactive waste disposal facility, the agency's secret site selection process, and the trial court's findings regarding the Santini development and the June 1991 siting designation, *id.* at 3a-17a, the court explained that "mere governmental planning and temporary steps

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[2]The *amici* specifically pointed out that the Connecticut Supreme Court should adhere to rulings of this Court by (1) abandoning the one-factor rules of decision found in its pre-1970's opinions (such as "fluctuations in the value of real property are merely incidents of ownership") in favor of adherence to and consistency with the specific criteria of *Penn Central* and *Lucas*; (2) abandoning government's intent to condemn as a factor in takings analysis; (3) consistently, rather than occasionally, recognizing investment-backed expectations as a takings claim factor; and (4) affirming that when analyzing a taking claim based on a less-than-total loss of economic use, the economic impact on the property owner should be weighed against harm that may result from the property owner's use, not (as the trial court held) some harm that the government, by use of the property after condemnation, seeks to avoid.

in anticipation of condemnation" do not, as a matter of law, constitute a taking. Because the agency's action "did not go beyond such planning and steps," *id.* at 17a, it was "*not necessary to discuss the plaintiffs' factual claims . . . .*" *Id.* at 17a, n.19 (emphasis added).

The court then acknowledged that the Fifth Amendment Takings Clause applies to the states, *id.* at 18a, but it addressed Santini's argument that decisions of this Court supply the relevant standards in this manner:

> [T]he plaintiffs argue that we may not interpret the Connecticut Constitution so as to provide less protection for individual rights in the use of property than what they refer to as a "minimum, national standard for protection of individual rights in the use of property" as furnished by the "fifth amendment." In the plaintiffs' view, the constitutional doctrine that the federal constitution provides "minimum, national" standards means that, when the United States Constitution is interpreted to grant rights thereunder, our state constitution must be interpreted to grant at least the same level of protection as that granted by the federal constitution. *What is meant by that doctrine, however, is irrelevant to this case.*

Id., n.20 (emphasis added). The court did not explain why it deemed the doctrine irrelevant. Notwithstanding Santini's detailed arguments about how Connecticut takings jurisprudence lagged behind federal standards, the majority continued:

> None of the parties argues that our state constitution provides different protection for property owners from that afforded by the federal constitution. Furthermore, we are not aware of any doctrine, cases or reason that would compel, in the context of this case, the treatment of the plaintiffs'

> state constitutional claims different than the treatment those claims would have been given had we been adjudicating the plaintiffs' claims under the federal constitutional takings jurisprudence. We, therefore, assume for the purposes of this appeal that article first, §11 of our state constitution affords the same protection as that provided under its federal counterpart.

Id.[3]

The opinion below then discussed the continued viability of *Textron v. Wood*, 355 A.2d 307 (Conn. 1974), where the court held that an inverse condemnation claim requires proof of the government's "fixed and irreversible intent" to condemn the subject land. App. 19a-22a. The court – momentarily acknowledging the relevance of federal law – concluded that this standard "has not been erased by subsequent United States Supreme Court jurisprudence . . . ." *Id.* at 22a. The opinion then asserted that *First English* supported the majority's holding that mere government planning is never a taking because it recognizes a categorical exclusion from takings liability for "depreciation in the value of property by reason of preliminary [government] activity. . . ." *Id.* at 23a.

The majority opinion, therefore, defined all government activity short of that which demonstrates a "fixed and irreversible intent" to condemn as "mere government planning," and thus not a taking as a matter of

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[3] In their Motion for Reargument and Reconsideration in the Connecticut Supreme Court, the petitioners pointed out that they had never argued that the takings clauses of the Connecticut and U.S. Constitutions differ, but rather had explained that Connecticut must update its jurisprudence to ensure that these provisions do *not* differ.

law. The majority concluded by dismissing the relevance of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas*, and *Penn Central* "because none of them involves mere planning by the government." App. at 24a-25a.

Dissenting, Justice Robert Berdon discussed at length the concurrence of the fact and expert witnesses at trial that, after the June 1991 announcement, the Santini land was economically idled for two years. *Id.* at 29a-31a, nn. 3, 4. This opinion pointed out decisions of this Court rejecting government's "intent to condemn" as being relevant to takings analysis, and chided the majority for dismissing this Court's interpretations of the Takings Clause of the Fifth Amendment. *Id.* at 31a-36a. In the other dissent, Justice (now Chief Justice) McDonald expressly lamented that the majority had failed to apply the criteria stated in *Penn Central, First English*, and *Lucas*. *Id.* at 36a-38a.

The plaintiffs filed a Motion for Reconsideration and Reargument on November 19, 1999. That motion reiterated, *inter alia*, that the issue was "the extent to which decisions of the U.S. Supreme Court interpreting the Bill of Rights must be applied by Connecticut courts when analyzing claims brought under the Connecticut Constitution." The motion was denied on December 13, 1999. App. 54a.

REASONS FOR GRANTING THE WRIT

I.

BECAUSE THIS COURT IN *WILLIAMSON COUNTY* DIRECTED THAT CONSTITUTIONAL TAKINGS CLAIMS BROUGHT AGAINST STATES OR LOCALITIES MUST BE ADJUDICATED IN STATE COURTS USING STATE LAW PROCEDURES, SUCH COURTS MUST ALSO BE DIRECTED THAT RULINGS OF THIS COURT INTERPRETING THE TAKINGS CLAUSE OF THE FIFTH AMEND-

MENT PROVIDE A NATIONAL STANDARD OF INDIVIDUAL RIGHTS THAT CANNOT BE IGNORED OR VITIATED.

A. State courts are now not only the primary but essentially the exclusive forum for the litigation and adjudication of takings claims against local, regional, and state governments. In *Williamson County*, 473 U.S. at 195, this Court held that the Takings Clause of the Fifth Amendment is not violated, and a claim brought thereunder is not ripe, until a property owner has availed itself of available state remedies and has been denied just compensation. Since then, nearly every federal circuit has dismissed as unripe Fifth Amendment claims brought originally in federal court.[4]

The primacy of state court as the forum for these claims[5] has been magnified by two post-*Williamson*

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[4] *See, e.g., Gilbert v. City of Cambridge*, 932 F.2d 51, 63-65 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Samaad v. City of Dallas*, 940 F.2d 925, 933-36 (5th Cir. 1991); *Forseth v. Village of Sussex*, 199 F.d 363, 368-73 (7th Cir. 2000); *Von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 379-80 (8th Cir. 1997); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 501, 405-407 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *Bateman v. City of West Bountiful*, 89 F.3d 704, 708-709 (10th Cir. 1996); *Agripost, Inc. v. Miami-Dade County*, 195 F.2d 1225, 1234 (11th Cir. 1999); *see generally*, G. Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. Land Use & Envtl. L. 91 (1994).

[5] While this Court in *Williamson County* left open the possibility of direct federal court claims in states that did not have an available remedy to obtain just compensation, in 1987, in *First English*, 482 U.S. at 315, this Court held that just compensation is the remedy for a regulatory taking and that remedy is "self-executing." Since *First English*, most courts and commentators have concluded that all such claims may, and therefore must, be

[footnote continued]

County developments. In *Graham v. Connor*, 490 U.S. 386, 395 (1989), this Court held that a claim of an unreasonable search and seizure must be brought not as a generalized substantive due process theory, but under the "explicit textual source of constitutional protection" of such claims, the Fourth Amendment. Since *Graham*, several federal courts have extended its reasoning to claims of deprivation of property, requiring them to be brought under the Takings Clause of the Fifth Amendment rather than the Fourteenth Amendment Due Process Clause. *See Macri v. King County*, 126 F.3d 1125, 1128-29 (9th Cir.), *cert. denied*, 522 U.S. 1153 (1998); *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 460 (D.C. Cir. 1997); *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996).

Meanwhile, lower federal courts have held that, notwithstanding that a Fifth Amendment taking claim is ripe until state remedies have been pursued, claims brought in federal court after state court decisions may be blocked by *res judicata*, collateral estoppel, and statute of limitations defenses. *See, e.g., Wilkinson v. Pitkin County*, 142 F.3d 1319 (10th Cir. 1998); *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir.), *cert. denied*, 525 U.S. 923 (1998); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992);[6] *see generally* T. Rob-

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brought in state courts. *See, e.g., Carson Harbor Village v. City of Carson*, 37 F.3d 468, 474 (9th Cir. 1994); *Tari v. Collier County*, 846 F. Supp. 973, 976 (M.D. Fla. 1994), *aff'd*, 56 F.3d 1533 (11th Cir. 1995); T. Roberts, *Ripeness and Forum Selection in Land-Use Litigation*, in *Takings*, Ch. 3 (D. Callies, ed.) (1996). *But see Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 698 n.2 (6th Cir.), *cert. denied*, 519 U.S. 818 (1996); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068, 1072-73 (M.D.-N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994).

[6] In *Fields*, the Eleventh Circuit agreed that *res judicata* principles would bar relitigation of a takings claim in federal court,

[footnote continued]

erts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law, 479 (1992).[7] In addition, of course, the federal courts must give full faith and credit to decisions of state courts under 28 U.S.C. §1738.

Thus, while subsequent federal court litigation[8] is a theoretical possibility,[9] through (1) the combination of *Williamson County* and *Graham* and their progeny; (2) issue and claim preclusion principles; and (3) other procedural defenses to subsequent federal litigation, in nearly all cases a property owner's one and only day in court for a taking claim against a state or locality is her state court lawsuit.[10]

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but the opinion contains an extensive discussion in *dictum* of the applicability of a so-called "*England* reservation" of the federal claim and concludes that such a reservation is possible. *See* 953 F.2d at 1304-05, *citing England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 511 (1964). In *Dodd*, however, the Ninth Circuit reached the opposite conclusion on this issue, 136 F.3d at 1227-28. The Fourth Circuit has stated in *dictum* that it would follow *Fields*, *see Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).

[7] In this case, the Connecticut Supreme Court's assumption, App. 18a, n.20, that the takings clauses of the Connecticut and U.S. Constitutions do not differ presumably would assist the Respondent in pleading *res judicata* to a subsequent federal court action.

[8] In the normal course of Connecticut's processing of civil actions, this case took five years and nine months to reach a final decision within the state judicial system.

[9] Presumably, a property owner will be successful in obtaining a federal trial on the merits of a taking claim subsequent to state proceedings only if she files her claim within the statute of limitations; the factual issues that underlie the takings claim were not resolved in the state court; and the state court declined to apply federal constitutional standards. *See, e.g., Fields*, 953 F.2d at 1302-09 (discussing the "jurisdictional problem created by the interplay between 28 U.S.C.A. §1738" and *Williamson County*).

[10] For a recent example of a federal court wrestling with a federal takings claim in light of the principle that the Fifth Amend-

[footnote continued]

B. Two well-settled principles underlie the Questions Presented here. First, a century ago, this Court held that the Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. *See Chicago, B. & Q. R. Co. v. City of Chicago,* 166 U.S. 226, 239-41 (1897). This Court reaffirmed this holding in *Penn Central,* 438 U.S. at 122. Second, in *Mills v. Rogers,* 457 U.S. 291 (1982), where an individual's liberty interest against forced administration of anti-psychotic drugs was at issue, this Court reiterated that within our federal system the Bill of Rights of the U.S. Constitution, as applicable to the states through the Fourteenth Amendment, furnishes a minimum standard for protection of individual rights, a level that a state may augment, but may not ignore, vitiate, or violate. 457 U.S. at 300. This principle has also been recognized[11] in *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 160-64 (1980) (Florida law characterizing private funds held temporarily by a court as public funds, thereby depriving the owner of interest, violated the federal Takings Clause); *Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 81 (1980) (California could adopt reasonable restrictions on use of shopping center so long as they do not

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ment establishes a national "floor" for takings claims adjudicated previously in state court, *see Evans v. Washington County,* No. 99-1356, 1999 WL 1271025 (D. Or., Dec. 10, 1999) (motion for remand to state court granted because federal claim not ripe). The most recent *Dodd* opinion, 136 F.3d 1219, also addresses the issue.

[11] Commentators have also explained this principle. *See, e.g.,* J. Aho, *A Case of Good Intentions: The Vermont Supreme Court and State Constitutional Protection of Civil Rights and Liberties,* 60 Alb. L. Rev. 1845, 1846 (1997); P. Caroccia Dringman, *Regulatory Takings: The Search for a Definitive Standard,* 55 Mont. L. Rev. 245, 275 (Winter 1994); W. Brennan, Jr., *The Bill of Rights and States: The Revival of State Constitutions as Guardians of Individual Rights,* 61 N.Y.U.L. Rev. 535, 548 (1986).

contravene the Takings Clause or other federal constitutional provisions); and *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).[12]

C. Since 1978, this Court has articulated a variety of standards for the analysis of takings claims brought under the Fifth Amendment. In *Penn Central*, this Court determined that while takings claims should be decided on their specific facts, a court should categorize those facts so as to examine three factors: the economic impact of the government's actions on the property; the government's interference with the owner's distinct, investment-backed expectations; and the "character" of the government's action. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court held that a regulatory taking occurs where there is no substantial advancement of a legitimate state interest or an owner is denied economically viable use of its land. In *First English* (1987), this Court recognized temporary takings and the mandatory nature of just compensation as a remedy. In *Lucas*, this Court held that where government action deprives an owner of all economically viable use of property, a taking has occurred unless state law principles of property or nuisance undermine the owner's original expectations of economic use.

Equally relevant to this case are the principles that: (1) takings claims are measured "not by what a state says, or by what it intends, but by what it *does*", *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., con-

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[12] Indeed, the Connecticut Supreme Court has recognized federal standards in other contexts. *See State v. Geissler*, 610 A.2d 1225 (Conn. 1992) (Connecticut's standards for exclusion of evidence derived from a warrantless police search exceed Fourth Amendment standards); *Cologne v. Westfarms Assoc.*, 469 A.2d 1201 (Conn. 1984) (freedom of speech protections of protestors in shopping center).

curring) (original emphasis);[13] (2) the purpose of the Fifth Amendment Takings Clause is to prevent the government from imposing on an individual a burden that should, in fairness, be borne by the general public, *see, e.g., Penn Central,* 438 U.S. at 122-24, *citing Armstrong v. United States,* 364 U.S. 40, 49 (1960); and (3) in takings claims, judicial analysis begins with an evaluation of the economic impact on the owner, usually by determining the percentage diminution in the value of the owner's property, *see, e.g., Lucas,* 505 U.S. at 1019, n.8 (discussing the role of percentage diminution in takings analysis); *Bowles v. United States,* 31 Fed. Cl. 37, 49 (Fed. Cl. 1994).

D. These principles and standards, as background, reveal the full measure of how the decision below conflicts with decisions of this Court. The Connecticut Supreme Court's majority opinion not only employs several takings standards that contradict decisions of this Court, but it also establishes threshold inquiries that undermine federal constitutional protection. The decision below:

- rejects the principle that decisions of this Court furnish national standards for the analysis and adjudication of takings claims brought under available state remedies;
- dismisses as irrelevant, without explanation, the three-factor *Penn Central* test, *First English*'s recognition of temporary takings, and the *Lucas* categorical formulation on loss of economic use;
- by limiting its inquiry to whether the agency's action was "mere government planning," deter-

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[13] *See also Yuba National Resources, Inc. v. United States,* 821 F.2d 638 (Fed. Cir. 1987); *Eberle v. Dane County Board of Adjustment,* 595 N.W.2d 730 (Wis. 1999).

mines that it was unnecessary to parse the plaintiffs' factual claims or to examine the undisputed evidence that the agency's actions economically froze the Santini property for two years and frustrated his distinct investment-backed expectations;

- declines to analyze whether, in rendering the property useless in order to examine its viability for public use, the agency imposed on an individual a burden that should have been borne by the general public;
- employs a severe governmental "intent to condemn" standard despite unequivocal decisions of this Court to the contrary;
- by using an intent standard, effectively holds that there is no longer any such thing as a regulatory taking in Connecticut, because a regulatory taking, by definition, is a restraint on the use of property that is *not* accompanied by an intent to condemn;[14]
- with the barest textual support and citing no subsequent opinions, interprets *First English* as containing a categorical exclusion from takings analysis of all liability for "precondemnation" activity;
- states, in *dictum*, that all takings claims require evidence of complete loss of economic use, thus ignoring *Penn Central, First English, Lucas,* and *Dolan;* and
- accepts, in *dictum* at least, the trial court's finding that Santini suffered a $715,000 loss in the value of the property, but makes no effort to identify the percentage diminution represented by this loss, as is required by *Penn Central* and *Lucas.*

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[14] Ironically, the opinion below acknowledges this definition, App. 11a, n.14.

The lower court did not even remotely provide Santini with the analysis, and therefore the level of protection, required by the Takings Clause of the Fifth Amendment and this Court's holdings. Santini was entitled to consideration of the *Lucas* categorical formulation. In the alternative, pursuant to *Penn Central*, if economically viable use remained after the 1991 announcement, he was entitled to judicial analysis of the economic impact of the agency's actions and its interference with his duly-issued permits and his substantial, reasonable development expenditures. These factors should then have been weighed against the benign nature of his land use, an as-of-right residential subdivision. In addition, the Connecticut court should not have employed an intent standard. Finally, the court below should have examined whether the agency, by freezing the Santini development in order to examine the land's suitability for radioactive waste disposal, was asking Santini to shoulder a burden that should have been absorbed by the state as a whole.

By rejecting this Court's decisions and fashioning contrary state constitutional standards, the majority opinion below plainly transgressed the principle that state laws may not be interpreted to provide less protection of individual rights than those guaranteed by the Bill of Rights of the U.S. Constitution.[15] Given the likely barriers to

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[15] The Connecticut Supreme Court has also rejected the holding of *Dolan* that the Fifth Amendment Takings Clause stands on an equal footing with other provisions of the U.S. Bill of Rights. In *Kelley Property Development, Inc. v. Lebanon*, 627 A.2d 909 (Conn. 1993), the court declined to create a damages remedy against local planning commissioners in part because they were "not professionals but . . . lay persons with little or no technical expertise. . . ." In *Binette v. Sabo*, 710 A.2d 688 (Conn. 1998), the court found a policeman liable for a warrantless entry and search. The court distinguished *Kelley* by explaining that in the earlier case,

[footnote continued]

subsequent federal court litigation discussed above, Santini has been denied any consideration of his Fifth Amendment rights.

E. *Williamson County* shifted takings litigation against states and localities to the state courts, but left open the issue of whether the body of Fifth Amendment takings law went with it. *Mills v. Rogers* and the other cases cited earlier would appear to hold that federal constitutional standards apply in state court takings cases, but the lower court in this case plainly rejected that view. This petition, therefore, presents three recognized bases for review by this Court: a conflict between this Court and the highest court of a state, *see, e.g., City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 371-72 (1974); an erroneous resolution of an important federal question by the highest court of a state, *see, e.g., Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982); and a need to clarify the proper accommodation of state and federal interests, *see, e.g., Arizona v. Manypenny*, 451 U.S. 239 (1981). The petitioners respectfully submit that the forum shift created by *Williamson County* now warrants clarification of the law that applies in that forum.

> [W]e were reluctant to impose constitutional tort liability on the members of the town planning and zoning commission because, as private citizens, "they might not be able to predict accurately what conduct would be found to violate the state constitution. . . ." In contrast, police officers are public employees who are expected – indeed, required – to comport themselves in accordance with constitutional standards.

710 A.2d at 699. Thus, *Binette* holds land use regulators to a lower standard of compliance with the state and federal constitutions than other government officials.

II.

IN ITS FAILURE TO ADHERE TO FEDERAL STANDARDS, THE OPINION BELOW IS CONSISTENT WITH DECISIONS IN SEVERAL OTHER STATES, BUT IN CONFLICT WITH OTHER JURISDICTIONS.

While some state cases recognize takings decisions of this Court as national standards for state court adjudication of takings claims, more prevalent are cases that effectively ignore this Court's decisions, acknowledge federal standards but violate them, or, as in the decision below, reject their relevance and then employ contradictory criteria.

A. Several state courts, either explicitly or by their unhesitating reference to opinions of this Court for rules of decision, have recognized that the federal Takings Clause furnishes standards for the adjudication of a takings claim brought under state law procedures.

In *Manocherian v. Lenox Hill Hospital,* 643 N.E.2d 479 (N.Y. 1994), *cert. denied,* 514 U.S. 1109 (1995), the New York Court of Appeals addressed the constitutionality of a state statute requiring owners of rent-stabilized apartments to provide renewal leases to certain employees of nearby hospitals. After recognizing the two-prong takings test (denial of economic use or failure to advance a legitimate governmental interest) set forth in decisions of this Court, the New York court noted that:

> We are governed by this framework and discern no analytical basis or precedential authority to drop below this floor of constitutional protection for property owners or to alter well-established substantive and procedural rubrics and guidance in this complex field.

643 N.E.2d at 483. Similarly, in *Eberle v. Dane County Board of Adjustment,* 595 N.W.2d 730 (Wis. 1999), the

court, after dismissing the property owner's Fifth Amendment taking claim as unripe, reversed a lower court's dismissal of the owner's state constitutional claim; overruled an earlier state decision as now being contrary to the takings jurisprudence of this Court; and held that a temporary taking had occurred. In *Lopes v. City of Peabody*, after a state land court denied a taking claim and this Court vacated the judgment and remanded for further consideration in light of *Lucas*, 507 U.S. 981 (1993), the Massachusetts courts applied federal standards and held that a taking had occurred, 629 N.E.2d 1312 (Mass. 1994), *after remand*, 718 N.E.2d 846 (Mass. 1999). Other recent state court cases recognizing decisions of this Court as minimum standards include *Wyer v. Board of Environmental Protection*, 2000 Me. LEXIS 49, 2000 WL 264202 (Me., Mar. 10, 2000) (applying federal and state constitutional standards to claim that denial of variance under Maine's "Sand Dune" laws was a taking); *Purdie v. Attorney General*, 732 A.2d 442 (N.H. 1999) (revision of boundary of public beach was a taking); and *Isla Verde International Holdings, Inc. v. City of Camas*, 990 P.2d 429, 435-37 (Wash. Ct. App. 1999) (subdivision condition requiring thirty percent set aside of open space was a taking).

In their recognition of rulings of this Court as constitutional standards to be applied to taking claims brought in state court under state law remedies, the decisions above plainly conflict with the decision below in this case.

B. Recent examples of state court decisions that take note of federal standards but then violate or vitiate them include *Gazza v. New York State Department of Environmental Conservation*, 679 N.E.2d 1035 (N.Y.), *cert. denied*, 522 U.S. 813 (1997), and *Grant v. South Caro-*

line Coastal Council, 461 S.E.2d 388 (S.C. 1995). In each case, the court distorted this Court's reference in *Lucas* to "background principles of state law" by holding that the mere enactment of a permitting process for a use intended by a property owner, prior to that owner's purchase, resulted in that intended use being excluded from the purchaser's original title to the property. The denial of a permit for that use was thus not a deprivation of a property interest, and not a taking. *Gazza* also holds, in contravention of *Lucas,*[16] that residual, passive recreational uses left to a property owner constitute economically viable use.[17]

In *Landgate v. California Coastal Commission,* 953 P.2d 1188 (Cal.), *cert. denied,* 525 U.S. 876 (1998), the California Supreme Court held that an error by a state agency about its jurisdiction, which left the subject property without economic use for several years while that dispute was being resolved in the courts, was a "normal delay" in the development permitting process and not a taking. In *Eberle,* 595 N.W.2d at 942 n.25, the court noted that the majority holding in *Landgate* had been considered and rejected by this Court in *First English.*

However, the most common approach in the state courts to federal takings standards is to treat them, at best, as non-binding guidance, as several commentators

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[16]The New York Court of Appeals employed the *Gazza* analysis in three other cases in 1997, all of which are discussed in S.J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From The Rule of Law,* 42 N.Y.L. Sch. L. Rev. 345 (1998). Professor Eagle questions the New York court's departure from Fifth Amendment standards. *Id.* at 346, 355.

[17]*See also Wyer v. Board of Environmental Protection,* 2000 Me. LEXIS 49, 2000 WL 264202 (Me., Mar. 10, 2000) (parking, picnics, barbecues and other recreational uses held to be economically beneficial).

have concluded in the past five years from detailed surveys of cases in the 1990's. Professor Ronald Rosenberg, in an article entitled *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?* 6 Fordham Envtl. L.J. 523 (1995), surveyed state court adherence to *Lucas* and *Dolan*. After noting that under *Williamson County* it falls to the state courts to adjudicate most taking claims, Professor Rosenberg concludes, after reviewing dozens of cases, that state courts

> [mention] U.S. Supreme Court decisions much more than they actually rely on them to justify specific case decisions. The vast majority of state cases often make trivial, passing references to the Supreme Court holdings. . . . The U.S. Supreme Court's doctrine has not been ignored by the state courts, but it generally has not been utilized as a basis for limiting community and state land use and environmental regulation. The state courts give the impression that they have a strong interest in 'managing' their jurisdictions without significant intrusion and interference by federal constitutional principles.

Id. at 555.[18]

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[18]Two recent examples of decisions that make no reference at all to decisions of this Court, even though the facts implicated federal standards, are *Lehigh-Northampton Airport v. WBF*, 782 A.2d 981 (Pa. Commw. 1999) and *Barham v. Southern Cal. Edison Co.*, 74 Cal. App.4th 744 (Cal. 1999). In *Lehigh*, an airport authority's expansion plan caused the termination of financing of private development of adjoining land; adjudicating a claim for a *de facto* taking under the state's eminent domain statute, the court did not refer at all to federal standards. In *Barham*, an inverse condemnation cross appeal against a utility company for a fire started by a failure of an overhead power line, the court, despite discussing *Penn Central*-type factors, made no reference to federal law.

Reviewing state court adjudications of taking claims from 1978 to 1998, Professor David Callies reached the same conclusion in *Regulatory Takings and the Supreme Court; How Perspectives on Property Rights Have Changed From Penn Central to Dolan, and What State and Federal Courts Are Doing About It,* 28 Stetson L. Rev. 523 (1999). Professor Callies surveyed cases interpreting – or responding to – *Lucas* and *Dolan.* His article posits that this Court has provided reasonably clear standards for taking claims, and concludes that "It is the states . . . that have muddled the puddle." *Id.* at 524. It then discusses opinions from New York (including *Gazza*), South Carolina, Minnesota, and Washington that evidence resistance to the focus that *Lucas* places on investment-backed expectations, and its reference to state law "background principles" of nuisance and property as counterweights to claims of loss of economically viable use. Professor Callies concludes that "[T]here is some purposeful ignoring of the per se rule [of *Lucas*] by some state and federal courts." *Id.* at 551.[19]

In one sense, that state courts have been resistant to accepting takings standards developed by this Court is not surprising. It has long been recognized that state courts are apt to be more protective of state interests over individual rights than the federal courts. Professor Eagle's article observes that this Court, in *United States Trust Co. v. New Jersey,* 431 U.S. 1, 26 (1977), stated that there is a greater need for federal judicial oversight when "the State's self-interest is at stake." 42 N.Y.L.

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[19] Similar conclusions are stated in Abraham, *Windfalls or Wildmills: The Right of a Property Owner to Challenge Land Use Regulations,* 13 J. Land Use & Envtl. L. 161 (1997); and Comment, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinance,* 19 U. Haw. L. Rev. 93, 142 (1997).

Sch. L. Rev. at 359. Moreover, most of the cases in the past 20 years in which this Court has articulated takings standards have been appeals from state courts (*e.g., Penn Central, Agins, First English, Nollan, Lucas,* and *Dolan*).

C. There is, of course, a realm of state court adjudications of takings claims in which reference to federal law is not necessary, such as when a state constitution exceeds the Fifth Amendment by awarding just compensation when property is "taken or damaged." Also, when a state interprets its constitution or other state law provision in a manner consistent with federal standards, a failure to refer to federal standards does not violate the Fifth Amendment. The problem addressed by this petition, however, is that the state courts, overall, have been utterly inconsistent with respect to whether Fifth Amendment standards constitute a mandatory reference point when they adjudicate takings claims that are before them because of *Williamson County*. Such conflict among the highest courts of several states about a federal constitutional question is a recognized basis for review by this Court, *see, e.g., St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772, 780 n.10 (1981). Resolving this conflict will provide guidance to state and federal litigants and judges throughout the nation.

III.

IN ORDER TO RESOLVE THE QUESTIONS PRESENTED, THIS COURT NEED NOT ADDRESS UNDERLYING FACTUAL ISSUES OR ASSESS ANY IMPACTS RESULTING FROM THE PROPERTY OWNER'S PERMITTED USE OF HIS LAND.

The fundamental error in the majority opinion below is its holding that by searching for the state agency's irrevocable intent to condemn and categorizing the agency's action as "mere" government planning, it did not

need to address the facts in the record with respect to economic impact, remaining economic use, interference with investment-backed expectations, or the character of the agency's action. However, to decide the Questions Presented, this Court need not address or resolve factual issues about remaining economic use, *see* App. 16a,[20] because the focus of this petition is the failure of the court below even to address the facts in the manner required by the Fifth Amendment.

The Questions Presented are also free of distractions in two other respects. First, Santini's investment-backed expectations are clear and undisputed. In 1991 (and for several years before), Santini had in hand all permits and approvals necessary to construct Ellridge Estates, and there were no environmental or engineering obstacles to his proceeding with other phases. He had spent $5 million of his own money on actual construction of infrastructure and homes. While there was a dispute at trial about the selling price of the homes and lots and the absorption rates at which the development would have proceeded absent the agency's June 1991 announce-

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[20] First, in August 1992, at the urging of his construction lender, Santini attempted to rejuvenate his moribund development by essentially giving away one of the constructed homes. The agreement stated a "purchase price" of $550,000, but Santini took back mortgages totaling $495,000 and provided a variety of free amenities. Neither of the appraisers who testified regarded this transaction as arms-length or evidence of fair market value. Second, Santini was approached in March 1992 by a James Wysocki, who sought to purchase a home at a significant discount, but Wysocki and Santini never came to any agreement, oral or written, on material terms. Third, in December 1991, while considering a foreclosure on its loan to Santini, a construction lender procured an appraisal of one of the model homes. The document lists a value of $400,000, but the appraiser who prepared it testified that this value was contingent on the repeal of the agency's siting designation.

ment, it is undisputed that Santini had a vested right to proceed.

Second, this case stands in contrast to most of the takings cases decided by this Court by virtue of the fact that the property owner's use was entirely benign, and the government's reason for condemning the subject property had nothing to do with the owner's existing or future use. Thus, this Court need not engage in an assessment of the government's reasons for terminating Santini's development activities.

CONCLUSION

For the foregoing reasons, the petitioners respectfully submit that this Petition for a Writ of Certiorari to the Supreme Court of Connecticut should be granted.

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March 31, 2000

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CONNECTICUT

Case No. SC 16023

EVANDRO S. SANTINI ET AL.

v.

CONNECTICUT HAZARDOUS WASTE
MANAGEMENT SERVICE

OPINION

Callahan, C.J., and Borden, Berdon,
Norcott, Katz, Palmer and McDonald, Js.*

Argued May 25 – officially released November 9, 1999

PROCEDURAL HISTORY

Action to recover damages for the alleged inverse condemnation of certain of the plaintiffs' real property, and for other relief, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and referred to *Hon. Norris L. O'Neill,* judge trial referee, who, exercising the powers of the Superior Court, ren-

*The listing of justices reflects their seniority status on this court as of the date of argument.

dered judgment for the defendant, from which the plaintiffs appealed. *Affirmed.*

Timothy S. Hollister, with whom was *Joseph P. Williams,* for the appellants (plaintiffs).

Frank H. Santoro, for the appellee (defendant).

William H. Ethier filed a brief for the Home Builders Association of Connecticut, Inc., et al. as amici curiae.

Richard Blumenthal, attorney general, and *Robert D. Snook,* assistant attorney general, filed a brief for the state department of economic and community development et al. as amici curiae.

OPINION

BORDEN, J. The dispositive issue in this appeal[1] is whether mere governmental planning may constitute a taking, in the form of an inverse condemnation, under article first, §11, of the Connecticut constitution.[2] The plaintiffs, Evandro S. Santini (Santini) and Santini Homes, Inc. (Santini Homes), appeal from the judgment of the trial court rendered in favor of the defendant, the Connecticut Hazardous Waste Management Service. By that judgment, the trial court concluded that no unconstitutional taking of any kind had occurred.

The plaintiffs claim that the trial court improperly concluded that: (1) the designation of the plaintiffs' properties among the three finalists for acquisition and

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[1] The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book §65-1 and General Statutes §51-199(c).

[2] Article first, §11, of the Connecticut constitution provides: "The property of no person shall be taken for public use, without just compensation therefor."

development as a disposal facility for low-level radioactive waste was not a practical confiscation and, therefore, was not an inverse condemnation under article first, §11, of the state constitution; (2) the defendant's conduct did not amount to an inverse condemnation under the alternative balancing test; and (3) mere governmental planning does not constitute a taking, in the constitutional sense. We conclude that mere governmental planning does not, as a matter of law, constitute a taking under article first, §11, of the state constitution, and that the defendant's conduct constituted only such planning. We therefore affirm the judgment of the trial court.

Some initial background is necessary to an understanding of this case. In the late 1970s, disposal capacity for low-level radioactive waste became a national issue. See *New York v. United States*, 505 U.S. 144, 150, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). In 1979, disposal facilities for low-level radioactive waste were available only in Nevada, South Carolina and Washington. Id. A temporary shut down of the facilities in Nevada and Washington left South Carolina with the burden of accepting all of the low-level radioactive waste produced nationally. In response, South Carolina reduced the amount of waste that it would accept by 50 percent. Id. In addition, "Washington and Nevada announced plans to shut down their sites permanently." Id. Faced with the threats of closings of the disposal facilities in these states, Congress enacted the Low-level Radioactive Waste Policy Act of 1980. Pub. L. No. 96-573, 94 Stat. 3347 (1980), codified at 42 U.S.C. §2021b et seq. "The 1980 Act authorized States to enter into regional compacts that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of

their disposal facilities to waste generated within member States." *New York v. United States*, supra, 151.

In 1985, there were only three approved regional compacts giving rise to operational facilities. Id. This meant that, by 1986, as many as thirty-one states had no "assured outlet for their low-level radioactive waste. With this prospect looming, Congress once again took up the issue of waste disposal." Id. The result was the Low-level Radioactive Waste Policy Amendments Act of 1985; Pub.. L. No. 99-240, 99 Stat. 1842 (1985), codified at 42 U.S.C. §2021c(a)(1)(A); which required states to accommodate the low-level radioactive waste generated in their states by disposing of it either in-state or through compacts with other states by the end of 1992.[3]

To encourage the implementation of the amendments, the 1985 act provided for three kinds of incentives. *New York v. United States*, supra, 505 U.S. 152-54. Among the incentives was the so-called "take title" provision, which required that a state that had not provided for an appropriate disposal facility by January 1, 1996, to take title and possession of the waste generated in such state or compact region or become liable to the generator for failing to do so. Id., 153-54. In *New York v. United States*, supra, 177, the United States Supreme Court held that the take title provision of the amend-

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[3]The amendments of the 1985 act represented a compromise between the three states that had the appropriate disposal facilities capable of handling low-level radioactive waste, the so-called sited states, and those states that did not have such facilities. *New York v. United States*, supra, 505 U.S. 151. In a nutshell, the sited states agreed to continue to accept the waste "from the beginning of 1986 through the end of 1992"; id., 152; and the states without the facilities agreed "to end their reliance on the sited States by 1992." Id., 151.

ments of the 1985 act was unconstitutional. The other provisions that were being challenged, however, survived. Id., 173-74.

In 1987, the Connecticut General Assembly adopted legislation for the development of a low-level radioactive waste disposal facility and charged the defendant[4] with the responsibility of locating a suitable site in Connecticut. General Statutes §22a-163c.[5] The defend-

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[4]The defendant is "a public instrumentality and political subdivision of the state of Connecticut"; General Statutes §22a-134bb(a); that, "in addition to its responsibilities under chapter 445a, [has the statutory obligation to] assist the state in fulfilling its responsibilities under the Northeast Interstate Low-Level Radioactive Waste Compact to provide for the management of low-level radioactive waste pursuant to the provisions of said compact. . . ." General Statutes §22a-163b.

[5]General Statutes §22a-163c provides: "Upon completion of the managemen plan required under section 22a-163b, the service shall evaluate and select one or more potential sites for a regional low-level radioactive waste facility. In making its evaluation, the service shall consider, but not be limited to, the following factors: (1) The economic feasibility of a waste facility at the site, including the proximity of the site to concentrations of generators of low-level radioactive waste; (2) the potential compliance of any waste facility constructed at the site with federal and state laws and regulations, including, but not limited to, environmental laws and regulations; (3) the risk a waste facility at the site would pose to the local public health, safety and welfare, including the risk from an accidental release of low-level radioactive wastes during transportation to the facility or while at the facility, and the risks from water, air and land pollution and from fire and explosions; (4) the effect of any waste facility constructed at the site on existing and planned local land use and development, and on local public facilities and services and private institutions; (5) the adverse effects of a waste facility at the site on agricultural and natural resources and the availability of resources for mitigating or eliminating such adverse effects by stipulations, conditions and requirements for the facility's design and operation; (6) the potential effects of any such facility on private and public water supplies;

[footnote continued]

ant developed a plan pursuant to §22a-163c to locate a proper disposal site in Connecticut for a facility for the disposal of low-level radioactive waste. The defendant then retained the Battelle Memorial Institute as the siting contractor to implement the site selection plan. Although the plan was not completed, in that no site actually was selected to become the location of the disposal facility, the defendant selected three candidates, any one of which potentially could have become the so-called "preferred site."[6]

After being selected as the preferred site, several additional administrative requirements would have been required for the site to become operative, namely, permits from the federal Nuclear Regulatory Commission, the state department of environmental protection; General Statutes §22a-163h(d);[7] and the Connecticut

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(7) the current and projected population density in the area where the facility is to be located; and (8) any other factor the service deems appropriate."

[6]The selection plan was to be carried out in several steps. The initial step was to screen the entire state for sites that were likely to be suitable. The next step involved identifying those sites that actually could have been suitable. Then the number of possible sites were to be narrowed to eight choices, a list of which was to be submitted to the defendant's board of directors. Out of the eight choices, three candidates were to be selected by that board. The last step, which was never implemented, was to perform on-site examinations of the candidate sites. From the three designated sites, one would have been chosen as the preferred site. The preferred site would have been studied further in accordance with the federal Nuclear Regulatory Commission's requirement of continuous monitoring for at least twelve months.

[7]General Statutes §22a-163h(d) provides: "The council shall not accept any application for a certificate for a low-level radioactive waste facility until the applicant has applied to the Commissioner of Environmental protection for all licenses, permits or approvals which are within his jurisdiction. The commissioner shall

[footnote continued]

siting council; General Statutes §22a-163h(a); would have been required.[8] Additionally, a proposed facility

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make available to the council the record of proceedings on the application for environmental licenses, permits or approvals. The commissioner shall immediately notify the chief elected official of the town where the facility is proposed to be located of receipt of an application for such licenses, permits or approvals."

[8] General Statutes §22a-163h(a) provides: "An application for a certificate shall be filed with the council, accompanied by a fee established by regulation adopted by the permanent members of the council, as provided in section 22a-163f, containing such information as the council may deem relevant, including, but not limited to, the following: (1) A description, including estimated cost, of the proposed facility; and a description of the waste to be handled and management technology to be used and, if a land disposal facility is proposed, an explanation of why no other management method is reasonably available; (2) reasons for choosing the site and the proposed type of low-level radioactive waste facility selected and a comparison of alternative sites and technologies; (3) a schedule of dates setting forth the proposed program of acquisition, construction, completion and operation; (4) environmental site information including, but not limited to, (A) maps with narrative description of air quality and movement, ground and surface water conditions, levels, movement and fluctuations, vegetation and wildlife populations and habitat, seismic characteristics and hydrogeologic evaluation of the site, setting forth data and analysis as the council shall require, including but not limited to, a map showing the proximity of the proposed site to facilities or properties owned or operated by a water company as defined in section 25-32a, a map showing the land classification of the proposed site under the classification established by section 25-37c, and a report on the impact of the proposed facility on the environment including, but not limited to, present and future public water supplies and private wells and (B) design, capacity, operation and management information; (5) human population density information for the area of the proposed facility; (6) traffic information including road and transportation access data and maps; (7) information on present and future development of the town where the facility is proposed to be located and for the surrounding towns; (8) a detailed description of provisions, including equipment and operation, for planning for prevention of hazards, monitoring of ground water quality, mitigation of the effect of the

[footnote continued]

might have been subject to regulations and restrictions imposed by "any town, city or borough," which would

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operation of the facility on public health, safety and welfare and the environment, and contingency plans and emergency procedures for dealing with facility malfunctions; (9) a listing of federal, state, regional and municipal agencies from which approvals have been received and the planned schedule of obtaining those approvals not yet received; (10) incentives offered and benefits accruing to the municipality in which the proposed facility is to be located; (11) an assessment of the need for the facility and the amount and types of the state's annual low-level radioactive waste generation which the applicant proposes to dispose of, treat or store at the facility; (12) a plan for facility closure and stabilization and post-closure observation and maintenance and transfer of the facility to the custodial agency for institutional control, as required by regulations adopted by the commissioner pursuant to section 22a-163f; (13) a detailed statement of the applicant's financial capabilities as well as a statement of the applicant's qualifications and previous experience with low-level radioactive waste management, including, but not limited to, a listing of all low-level radioactive waste management projects or methods with which the applicant has had any connection or affiliation, either as owner, operator, contractor, supplier or consultant and if the person is a business entity, the names and addresses of all parent and subsidiary corporations, partners, corporate officers and stockholders holding more than fifteen per cent of the stock of the corporation; (14) a list of any criminal or civil charges and enforcement actions, or other formal or informal enforcement proceedings related to low-level radioactive waste or to other state or federal laws, regulations, licenses, permits, approvals, certificates or orders in which the applicant or any corporate parent, subsidiary, affiliate, partner, corporate officer or director or stockholder holding more than fifteen per cent of the stock of the corporation has been involved; (15) a schedule of dates for the initial receipt of wastes at the facility and facility closure; (16) an analysis of the compatability of the facility with surrounding land uses; (17) local, state, and federal standards, codes, and regulations applicable to the design, location, operation, and closure of the facility; (18) a description of the proposed methods of segregation and storage of wastes, any treatment processes to be used, and methods of waste emplacement; (19) a description of all proposed facility pollution monitoring and proposed control methods and procedures; (20) a

[footnote continued]

have been subject to review by the siting council. General Statutes §22a-163n(b).[9] If these requirements had

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description of proposed audit and quality control procedures; (21) a health risk assessment, including projected effects on mortality and morbidity rates among affected populations; (22) a description of methods of preventing inadvertent intrusion and assuring facility security; (23) applicable design criteria pertaining to natural phenomena and a description of how the proposed design of the facility meets these criteria; (24) an analysis of the amounts of third party insurance, surety bonds, trust funds and other forms of security that will be required to meet the financial requirements specified in subsection (d) of section 22a-163*l* and in section 22a-163o; (25) a plan for meeting the financial requirements analyzed under subdivision (24) of this subsection; (26) a description of the management and administrative program for the operation of the proposed facility which contains the name of the principal individual to be responsible for operation, a resume of the individual's qualifications and experience, and a statement of the number, duties, qualifications and experience of all key personnel, as determined by the council, to be involved in the storage, treatment or disposal of low-level radioactive waste; and (27) a copy of any application and any environmental report the applicant files with the United States Nuclear Regulatory Commission to obtain a license to operate a regional low-level radioactive waste management facility if a license is required."

[9]General Statutes §22a-163n(b) provides: "A proposed low-level radioactive waste facility may be regulated and restricted by any town, city or borough pursuant to chapters 124 and 126 and by any municipality pursuant to sections 22a-42 and 22a-42a. The applicant shall apply for any permits required by such agencies at the same time as the filing of the application with the council. Such local bodies may make all decisions necessary to the exercise of such power to regulate and restrict, which decisions shall be made within one hundred thirty days of any application notwithstanding any other statute to the contrary and shall be in writing and recorded in the records of their respective communities, and written notice of any decision shall be given to each party affected thereby. Each such decision shall be subject to the right of appeal within thirty days after the giving of such notice by any party aggrieved to the council, which shall have exclusive jurisdiction, in the course of any proceeding on an application for a certificate or otherwise, to affirm, modify or revoke such order or to make

[footnote continued]

been satisfied, eminent domain proceedings would have gone forward and the property owner would have been compensated. General Statutes §22a-163w(c).[10] The department of public works, rather than the defendant, would have been the entity responsible for acquiting the site. General Statutes §22a-163w(b)[11] and (c).

On June 10, 1991, the defendant announced the location of the three sites, one of which overlapped certain properties in Ellington that were owned by the plaintiffs.[12] In January, 1992, the governor's office proposed legislation to rescind the statutory acquisition of a public facility for the disposal of low-level radioactive waste in Connecticut. On May 5, 1992, the

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any decision in substitution thereof by a vote of eight of the members of the council. Appeal of a local zoning decision to the council shall be in lieu of any other appeal authorized by the general statutes."

[10]General Statutes §22a-163w(c) provides: "The Commissioner of Public Works shall have the power to condemn real property, in accordance with the procedures set forth in sections 8-129 to 8-133, inclusive, for the purpose of siting a regional low-level radioactive waste facility, provided such property is selected by the service as the site for a low-level radioactive waste facility."

[11]General Statutes §22a-163w(b) provides: "The Commissioner of Public Works shall initiate actions to acquire, through purchase or otherwise, the site selected by the Connecticut Hazardous Waste Management Service as the site for a low-level radioactive waste facility as specified in subsection (b) of section 22a-163d. The Commissioner of Public Works shall initiate such actions when notified by the service that the site has been selected. Acquisition of the site shall not be subject to review by the State Properties Review Board."

[12]Two of the sites were located in the town of Ellington. The third site was located on the border of the towns of East Windsor and South Windsor.

legislature repealed the siting announcement.[13] See Public Acts 1992, No. 92-45.

Thereafter, the plaintiffs brought this action against the defendant claiming that its action in designating certain property of the plaintiffs in Ellington as a potential site for a low-level radioactive waste disposal facility constituted a temporary taking by inverse condemnation without just compensation[14] in violation of article first, §11, if the Connecticut constitution. The plaintiffs alleged that their property was the subject of a taking from June 10, 1991, through 1994, which included the eleven months that the siting announcement was in place and a "stigma period"[15] that followed the May, 1992 legislative abrogation of the selection of the three candidate sites. The plaintiffs alleged that the siting announcement: (1) prevented them from selling homes and lots in certain property known as the Ellridge Estates subdivision; (2) prevented them from proceeding with

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[13]The record before us indicates that, to date, no disposal facility has been built in Connecticut. The low-level radioactive waste generated in Connecticut is being shipped to Barnwell, South Carolina, for disposal.

[14]"Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. . . . Inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. . . . *Agins v. Tiburon*, 447 U.S. 255, 258 n.2, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)." (Citations omitted; internal quotation marks omitted.) *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 221, 249-50 n.15, 662 A.2d 1179 (1995).

[15]The plaintiffs alleged that the negative impact of the defendant's announcement continued through 1994, after the siting announcement officially was lifted in 1992. They refer to this period as the "stigma period."

further construction of Ellridge Estates or development of certain property abutting Ellridge Estates; and (3) denied them any economic return on the investments they had made in those properties. These impacts, the plaintiffs alleged, resulted in the destruction of the fair market value, and the deprivation of all economically viable use, of their properties, thereby constituting a practical confiscation. The plaintiffs also alleged that the defendant's announcement undermined their reasonable "investment-backed expectations of completing the development of their properties . . . ." After a trial to the court, the trial court concluded that there had been no unconstitutional taking and, accordingly, rendered judgment for the defendant.

The trial court found the following facts. Santini is a developer of single-family houses and rental apartments. He is the president and the treasurer of Santini Homes, a Connecticut corporation engaged in the construction business. Santini Homes is a subchapter S corporation, which allows income derived or losses claimed from it to pass through to Santini.

In 1985, Santini purchased a twenty acre subdivision in Ellington known as Ellridge Estates. Ellridge Estates was then, and at the time of the trial remained, zoned for single-family residential homes. It was then eligible for sewer service from the town of Ellington, had an available water supply, and had no wetlands or other environmental obstacles that could restrict its development for residential purposes.

In the same year, the Ellington planning and zoning commission approved a subdivision plan for a sixteen lot subdivision on Ellridge Estates. Santini then began to

build the infrastructure for Ellridge Estates, which included "the water supply connections, drainage improvements, and the access road." In the same year, the Ellington water pollution authority requested Santini to install a sewage disposal pipe beneath the access road in Ellridge Estates "to be connected to the public sewer system." He installed the sewer line.

In 1986, Santini transferred Ellridge Estates, which he had bought for $147,500, to Santini Homes for $864,000. In 1987, the real estate market started to decline.

In 1988, Santini purchased a fifty-four acre parcel of land adjoining Ellridge Estates, which has several hundred feet of frontage on Pinney Street, a town road (Pinney Street property). Ten acres of the Pinney Street property was, and at the time of the trial continued to be, zoned for multifamily residential use. This part of the property is within 600 feet of Pinney Street. The remaining portion of the Pinney Street property was zoned for single-family homes in the same way as Ellridge Estates. Similar to Ellridge Estates, the Pinney Street property had access to the town's sewer service, had an available water supply, and its use was not restrained by environmental restrictions. Upon its purchase, Santini discontinued the agricultural use of the Pinney Street property.

Having acquired the Pinney Street property, the plaintiffs had acquired the land necessary to proceed with their development plan. The plan was to build luxury homes on the sixteen subdivided lots on Ellridge Estates, and smaller, less expensive single-family houses on the Pinney Street property. The plaintiffs also had consid-

ered building multifamily homes on the ten acres of the Pinney Street property that was closest to Pinney Street.

In 1987, Santini Homes began to build two model homes on the sixteen subdivided lots in Ellridge Estates, and two more model homes in 1989. The infrastructure of the subdivision continued to be developed from late 1989 through the spring of 1991. In late 1990, and early 1991, using his income from a rental complex in Vernon, Santini borrowed more than $20 million, at an average interest rate of 9 percent, from Prudential Insurance Company, Manufacturers Life and the New Connecticut Bank and Trust/FDIC, in order to provide financial support to Santini Homes. In March, 1991, the construction creditor for Ellridge Estates, Society for Savings, instituted a favorable mortgage loan program for residential purchasers. The availability of credit, the trial court inferred, exhibited the "beginning of the end of what had been called the 'credit crunch' of 1989-90."

In March, 1991, all but ten acres of Ellridge Estates was removed from the Ellington sewer district. The renoval reduced the value of the Pinney Street property. Although the sewer line that the plaintiffs had constructed at the town's request was rendered useless, the value of Ellridge Estates was not affected substantially because septic systems had been approved for that property.

On June 10, 1991, the defendant announced that a 250 acre area in Ellington, along with two other sites, had been designated as candidates for the construction of a low-level radioactive nuclear waste disposal facility. The defendant also identified five other "back up sites" about two weeks after its June 1991 announcement. The 250 acre area in Ellington that the defendant had designated as a candidate site included the Pinney Street property,

twelve of the completed subdivided lots in Ellridge Estates, and part of the access road to the twelve lots. The area did not include the four homes that already had been built. It is important to emphasize that neither Ellridge Estates nor the Pinney Street property definitely was subject to being taken by the state because the Ellington area had not as yet been designated as the preferred site for a low-level radioactive waste facility.

The plaintiffs had not been aware of the site selection process prior to the June 10, 1991 announcement. Furthermore, the trial court found that the defendant had not filed any notice or lien on the Ellington land records with respect to the siting announcement. The trial court also determined that "the site designation process was secret."[16]

The announcement caused some negative effects on the real property sales near the three candidate sites. Santini Homes experienced difficulty in selling the homes that were being constructed on the four subdivided lots outside of, but in proximity to, the designated area.[17]

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[16]The process that led to the selection of the thee candidate sites was not public, although the three candidate sites were selected by the defendant's board publicly from data that had been presented to the board in a geographically neutral manner. The defendant's board had made the decision not to disclose the intermediate steps leading to the selection of the candidate sites in order to minimize the possibility of creating unrest in communities. It is undisputed, however, that in early 1991, the defendant had held a series of public meetings to inform various decision makers in the state, including local elected officials, of the selection plan. In addition, several briefings were held for various legislative committees while the legislature was in session, and a special briefing was conducted in May, 1991, to apprise the legislature of the defendant's progress and how the defendant planned to proceed.

[17]No homes were sold prior to the defendant's announcement.

Minor incentives were offered to promote sales. Development could not proceed so that debts could be paid down from the proceeds, however, because "additional construction might not have been compensable in eminent domain proceedings if the sites were eventually taken." In May, 1992, the legislature rescinded the siting announcement of the Ellington area as a disposal site.

In August, 1992, the plaintiffs sold a home to Jeffrey Zoufaly and his wife for $530,000. In December, 1991, having taken the defendant's announcement into consideration, that home had been appraised at $400,000. In June, 1997, Santini Homes bought that house back from Zoufaly "for $460,000 or $470,000." There also had been negotiations for the sale of a house to another buyer, James Wysocki, who had offered to pay a purchase price in the mid-$300,000 range, with a $50,000 deposit. Santini Homes rejected this offer. Initially, the homes had been offered in the $500,000 range. By 1991, the asking price for the homes that had not been sold had been reduced by $50,000.

The trial court concluded that there had not been a practical confiscation, temporary or permanent, of either property because the defendant's selection of the properties as a candidate to be taken by the state constituted mere planning, which did not amount to an unconstitutional taking. Moreover, the trial court concluded that there was no confiscation under the alternate balancing test articulated in *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 221, 256, 662 A.2d 1179 (1995), because the plaintiffs had failed to demonstrate that the properties had lost all their

"use and value" because of the defendant's action.[18] Accordingly, the trial court rendered judgment for the defendant. This appeal followed.

The plaintiffs claim that: (1) the trial court's critical finding adverse to them, namely, that they had not established that the defendant's action rendered their property without economic value, was clearly erroneous; (2) as a matter of law, the evidence satisfied the alternative test for taking under the Connecticut constitution, namely, the balancing test; and (3) the trial court's conclusion that mere planning does not constitute a taking is flawed. We conclude that: (1) mere governmental planning and temporary steps in anticipation of condemnation of property do not constitute a constitutional taking under either the practical confiscation or the balancing text; and (2) the defendant's conduct did not go beyond such planning and steps. This conclusion renders it unnecessary to discuss either of the plaintiffs' first two claims.[19]

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[18]The trial court also found, however, that for the period of time that the siting announcement was in effect, had there been a taking, the twelve lots in Ellridge Estates would have suffered a loss of $480,000, the value of the lots outside the designated area would have been reduced by $170,000, and the Pinney Street property would have suffered $65,000 in loss of value.

[19]Although, in view of our conclusions of law regarding the effect of mere governmental planning, it is not necessary to discuss the plaintiffs' factual claims, we refer briefly to those claims only to respond to certain factual assertions in the dissenting opinions. Justice Berdon in his dissent states: "[N]o one purchased a house on the investment property in the wake of this announcement"; "every expert witness at trial testified that the announcement stripped the investment property of essentially all of its value"; and "the defendant's own expert . . . testified that it was impossible for the plaintiffs to sell houses on the investment property (and, hence, generate any revenue) for two years after the

[footnote continued]

We first note that both the fifth amendment to the United States constitution, as applied to the states through the due process clause of the fourteenth amendment, and article first, §11, of our state constitution, provide that private property shall not be taken for public use without just compensation therefore. The plaintiffs brought their claim of inverse condemnation solely under the Connecticut constitution and, therefore, we limit our analysis to that provision.[20]

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announcement." Justice McDonald in his dissent states that the defendant's conduct "totally interfer[ed] with the plaintiffs' investment backed expectations to develop the property for residential purposes."

It suffices to say that these factual assertions are not supported by the record, and are inconsistent with the extensive factual findings of the trial court, which *are* supported by the evidence in the case. In brief, the trial court made a critical factual finding adverse to the plaintiffs' claims, namely, that they had not met their burden of proving that the siting announcement deprived their properties of all economically viable use during the period in which they claimed a temporary taking. Our thorough review of the record indicates that this finding, as well as other critical factual findings adverse to the plaintiffs' claims, are fully supported by the record.

[20] In their brief on appeal, the plaintiffs argue that we may not interpret the Connecticut constitution so as to provide less protection for individual rights in the use of property than what they refer to as a "minimum, national standard for protection of individual rights in the use of property" as furnished by "the fifth amendment." In the plaintiffs' view, the constitutional doctrine that the federal constitution provides "minimum, national" standards means that, when the United States constitution is interpreted to grant rights thereunder, our state constitution must be interpreted to grant at least the same level of protection as that granted by the federal constitution. What is meant by that doctrine, however, is irrelevant in this case. None of the parties argues that our state constitution provides different protection for property owners from that afforded by the federal constitution. Furthermore, we are not aware of any doctrine,

[footnote continued]

The plaintiffs claim that our holding in *Textron, Inc. v. Wood*, 167 Conn. 334, 350, 355 A.2d 307 (1974) – that as a matter of law mere governmental planning does not constitute a taking – cannot survive current federal takings jurisprudence. The defendant argues that *Textron, Inc.*, is still good law. We agree with the defendant.

In *Textron, Inc.*, the plaintiff, which owned a manufacturing plant on John Street in New Britain, was notified in August, 1962, by the state highway department that Route 72, a proposed state highway, might pass through all or a part of the John Street property. In November, 1965, the department informed the plaintiff that Route 72 in fact would do so. The department also informed the plaintiff that the taking lines had been fixed, that they could not be changed, and that the plaintiff would be required to vacate the property by 1967. Id., 336-37. In addition, in 1966, the department advertised for construction bids and filed a map of the planned highway with the New Britain town clerk. Id., 338. In 1967, the department informed the plaintiff that actual highway construction would begin in 1969, and would take two years to complete. For several years thereafter, the department reiterated its intention to initiate formal condemnation proceedings by filing an assessment of damages as provided in General Statutes §13a-73(b).[21] The department did not file the assess-

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cases or reason that would compel, in the context of this case, the treatment of the plaintiffs' state constitutional claims different than the treatment those claims would have been given had we been adjudicating the plaintiffs' claims under the federal constitutional takings jurisprudence. We, therefore, assume for the purposes of this appeal that article first, §11, of our state constitution affords the same protection as that provided under its federal counterpart.

[21] General Statutes §13a-73(b) provides; "The commissioner may take any land he finds necessary for the layout, alteration,

[footnote continued]

ment of damages, however, until 1973. *Textron, Inc. v. Wood*, supra, 167 Conn. 338-39.

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extension, widening, change of grade or improvement of any state highway or for a highway maintenance storage area or garage and the owner of such land shall be paid by the state for all damages and the state shall receive from such owner the amount or value of all benefits resulting from such taking, layout, alteration, extension, widening, change of grade or other improvement. The use of any site acquired for highway maintenance storage area or garage purposes by condemnation shall conform to any zoning ordinance or development plan in effect for the area in which such site is located, provided the commissioner may be granted any variance or special exception as may be made pursuant to the zoning ordinances and regulations of the town wherein any such site is to be acquired. The assessment of such damages and of such benefits shall be made by the commissioner and filed by him with the clerk of the superior court in the judicial district in which the land affected is located, and such clerk shall give notice of such assessment to each person having an interest of record therein by mailing to each a copy of the same, postage prepaid, and, at any time after such assessment has been made by said commissioner, the physical construction of such layout, alteration, extension, widening, maintenance storage area or garage, change of grade or other improvement may be made. If notice cannot be given to any person entitled thereto because his whereabouts or existence is unknown, notice may be given by publishing a notice at least twice in a newspaper published in the judicial district and having a daily or weekly circulation in the town in which the property affected is situated. Any such published notice shall state that it is a notice to the last owner of record or his surviving spouse, heirs, administrators, assigns, representatives or creditors if he is deceased, and shall contain a brief description of the property taken. Notice shall also be given by mailing to each such person at his last-known address, by registered or certified mail, a copy of such notice. If, after a search of the land and probate records the address of any interested party cannot be found, an affidavit stating such facts and reciting the steps taken to establish the address of any such person shall be filed with the clerk of the superior court and accepted in lieu of service of such notice by mailing the same to the last known address of such person. Upon filing an assessment with the clerk of the superior court, the commissioner shall forthwith sign and file for record with the town clerk of the town

[footnote continued]

On the basis of these facts, we concluded that the trial court properly had determined that the property had been taken, in a constitutional sense, in 1966. Id., 350. We stated that, short of the filing of an assessment of damages under the statute and short of a physical appropriation of the property by the state, either of which would constitute a traditional taking, a taking also may occur where there is "a substantial interference with private property which destroys or nullifies its value or by which the owner's right to its use or enjoyment is in a substantial degree abridged or destroyed." Id., 346. We stated further that "[t]he situations in which the concept of de facto condemnation applies, however, are limited: Mere planning by a government body in anticipation of the taking of land for public use and preliminary steps taken to accomplish this without the statutory filing of condemnation proceedings and without physical taking is not actionable by the owner." Id.

Moreover, we pointed out that, in order for there to be such a substantial interference involving "the invasion of some specific legal interest in the property," there must have been a "definitive indication that the state's intent to condemn the property in question has become fixed and irreversible." Id., 348. The reason for this requirement of such a definitive, fixed and irreversible

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wherein such real property is located a certificate setting forth the fact of such taking, a description of the real property so taken and the names and residences of the owners from whom it was taken. Upon the filing of such certificate, title to such real property in fee simple shall vest in the state of Connecticut except that, if it is so specified in such certificate, a lesser estate, interest or right shall vest in the state. The commissioner shall permit the last owner of record of such real property upon which a residence is situated to remain in such residence, rent free, for a period of one hundred twenty days after the filing of such certificate."

intention is twofold: (1) once the state has reached such a final decision, "no one, not even the federal government, can interfere with the sovereign's right to properly exercise its power of eminent domain"; id.; and (2) without such a requirement, both the state and the property owner would be deprived "of the capacity to reasonably gauge their respective rights and effectively plan their future activities." Id., 349.

Applying these principles to the facts of the case, we held that by 1966, "the state highway department's intention to take the plaintiff's property had become irreversible." Id., 350. We held, "in view of the exceptional and extraordinary circumstances presented by the facts of this case, that the prohibitory statements, decisions and actions by the defendant evidenced an unequivocal intention to take the plaintiff's property, to the point where the landowner's capacity to freely dispose of that property was for all practical purposes effectively arrested; constituted a 'substantial interference' with its property rights; and amounts to a taking of the property in a constitutional sense." Id.

The line that this court drew in *Textron, Inc.*, therefore, was between, on one hand, mere governmental planning and preliminary steps in anticipation of condemnation, and, on the other hand, a fixed and irreversible decision by the state to exercise its power of eminent domain regarding the property in question. In our view, contrary to the assertion of the plaintiffs, that line has not been erased by subsequent United States Supreme Court takings jurisprudence, and, as a matter of constitutional takings policy, the line continues to make good sense.

None of the cases on which the plaintiffs rely for their assertion is inconsistent with *Textron, Inc.* In *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 321, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), the court held that the fifth amendment requires compensation as a remedy for a temporary regulatory taking. In that case, the county had enacted, effective immediately, an interim flood protection ordinance that, the plaintiff claimed in its action for compensation in the state courts, denied it all use of its property. Id., 311. The California courts held, however, that a landowner who claimed to be aggrieved by a regulatory taking could not obtain compensation until it had *first* secured a final adjudication that the challenged regulation was invalid and the government, thereafter, nevertheless cojntinued the regulation in effect. Id., 312. The United States Supreme Court held, contrary to the county's position, that the fifth amendment, as applicable to the states through the fourteenth amendment's due process clause, requires compensation for a temporary regulatory taking; id., 318; and that the landowner need not wait until a challenged ordinance ultimately has been held invalid in order to obtain that compensation. Id., 320.

First English Evalgelical Lutheran Church is not, as the plaintiffs maintain, inconsistent with our decision in *Textron, Inc.* Indeed, in *First English Evangelical Lutheran Church* the court reiterated "the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and . . . *depreciation in value of the property by reason of preliminary activity is not chargeable to the government.*" (Emphasis added.) Id. Thus, the court implicitly recognized the same line that we drew in *Textron, Inc.*

The plaintiffs argue, nonetheless, that "if no taking can occur until the government's decision to acquire property becomes fixed and irreversible, then a temporary taking – one in which the government *reverses* itself – can never occur." (Emphasis in original.) This argument is flawed because it overstates the meaning of irreversibility in our takings jurisprudence. Once the government has passed beyond the stage of planning and preliminary steps, and decided *definitely* and *unqquivocally* to take a landowner's property, under *Textron, Inc.*, an inverse condemnation has taken place, and the landowner's loss must be measured from that date. The fact that, at some later date, the government reverses its course and abandons what it considered at the earlier date to be a fixed and irreversible decision, would not relieve the government of its obligation to pay compensation for the previously accomplished temporary taking. That does not mean, however, as the plaintiffs suggest, that the line drawn in *Textron, Inc.*, is no longer constitutionally valid.

The plaintiffs also argue that because the defendant was required by federal and state law to design and implement the designation process, its action satisfied the *Textron, Inc.*, test. We disagree. The concept of irreversibility as articulated in *Textron, Inc.*, applies to the state's decision to condemn the defendant's property, not to the fact that the planning process is required by law.

The other cases on which the plaintiffs rely do not support their assertion because none of them involves mere planning by the government. See, e.g., *Dolan v. Tigard*, 512 U.S. 374, 377, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (dedication of property required as condition of securing permit); *Lucas v. South Carolina Coastal*

Council, 505 U.S. 1003, 1007-1008, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (enactment of statute prohibiting coastal habitable improvements); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 109, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (enactment of statute barring alteration of landmark property).

Furthermore, we are persuaded that the policies behind the *Textron, Inc.*, demarcation remains sound. First, as we have explained, once the state has reached a final decision, no one can interfere with its soversign right properly to exercise its power of eminent domain, and without the *Textron, Inc.*, line the state and private property owners would be deprived of the ability to gauge their respective rights and to plan their future activities. *Textron, Inc. v. Wood*, supra, 167 Conn. 348-49. Furthermore, if the government were to be considered as having accomplished a compensable taking as a result of mere planning that, because of its publicity, harmed the value of property, public planning would be discouraged, and governmental secrecy in the planning process would be encouraged. Neither course strikes us as wise public policy, or as constitutionally mandated by the just compensation clause. Governmental planning is necessary to wise governmental conduct, and public planning – yielding public scrutiny and comment – is generally considered likely to yield a better ultimate result than secret, unscrutinized official activity.

It is true that, in some cases, the public planning process may result in a landowner's property value being significantly harmed, either before the ultimate taking occurs or, if for some reason the taking never does occur, on a temporary basis. The line that we

drew in *Textron, Inc.*, however, strikes an appropriate balance between that risk to landowners and the concomitant need to preserve the governmental planning process as a matter of sound public policy.

The plaintiffs argue, however, that, even given the *Textron, Inc.*, line, in the present case, the defendant's conduct went beyond mere planning and preliminary steps, and demonstrated a fixed and irreversible intent to take their property. The record demonstrates the contrary.

It is undisputed that the selection process narrowed the defendant's range of choices to three potential sites, with one of the three to be selected as the ultimate disposal site. Further study was necessary before any such final choice was to be made, particularly regarding whether on any such site there were exclusionary characteristics that would preclude it from being selected as the preferred sites. Moreover, there were several administrative requirements to be met in order for the preferred site finally to be selected for construction of the disposal facility. These included permits from the federal Nuclear Regulatory Commission, the department of environmental protection, the siting council, and local planning, zoning and wetlands agencies. In addition, no witness who testified regarded the plaintiffs' property as the final site for the disposal facility. In fact, there was testimony to the contrary. Bruce Cagnanello, an officer of the Connecticut Association of Realtors, testified that the association had issued a memorandum for realtors to inform potential buyers that the designated sites were merely under consideration and that it was not certain that any one site would be selected. Also, Ronald Gingrich, the state's director of the low-level radioactive waste program, testified

that the defendant had not made a fixed and irreversible decision to take the plaintiffs' property.

The defendant's conduct consisted of nothing more, in a constitutional sense, than planning and temporary steps in anticipation of condemnation of some property, not necessarily that of the plaintiffs. Therefore, the defendant's conduct did not constitute a taking of the plaintiffs' property.

The judgment is affirmed.

In this opinion CALLAHAN, C.J., and NORCOTT, KATZ and PALMER, Js., concurred.

BERDON, J., dissenting. The opinion that the majority has rendered today disregards a foundational principle of our democracy: the constitution imposes substantial restraints upon the harms that the state may impose upon individuals without just compensation. See *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (constitution in general and takings clause in particular "designed to limit the flexibility and freedom of governmental authorities"). For this reason, I dissent and also join in Justice McDonald's dissent.

The facts of the present case are straightforward. The plaintiffs, Evandro S. Santini and Santini Homes, Inc., invested a substantial amount of money developing two parcels of land, one of which is known as Ellridge Estates and the other an adjoining parcel referred to as the Pinney Street property (collectively, the investment property), for the purpose of constructing and selling houses. The defendant, Connecticut Hazardous Waste

Management Service – which is a "political subdivision of the state"[1] – publicly announced that it was about to select a site for the disposal of radioactive waste, and that the investment property was one of three finalist locations (announcement). Not surprisingly, no one purchased a house on the investment property in the wake of this announcement.[2] Moreover, every expert witness at trial testified that the announcement stripped the investment property of essentially all of its value because neither the houses nor the property could be sold while the designation as a radioactive waste disposal area was in effect. And for good reason: as the trial court found, "[s]uch waste remains radioactive

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[1] General Statutes §22a-134bb(a).

[2] In the wake of the June 10, 1991 announcement, the plaintiffs encountered significant difficulty selling houses. On November 4, 1991, the plaintiffs received an offer from Jeffrey Zoufaly for "half the price." It was not until April 23, 1991, that the parties signed a purchase agreement with the knowledge that the legislature would soon vote on whether to rescind the designation of the plaintiffs' investment property as a potential site for the disposal of radioactive waste. Indeed, the agreement was contingent upon the legislature's decision not to designate the investment property as such a site. The legislature rescinded the designation on May 5, 1992. The sale to Zoufaly was finalized on August 11, 1992, more than one year after the June 10, 1991 announcement and three months after the rescission of the designation. The house sold for $530,000. The trial court noted that "[w]hen home sales resume, the plaintiffs were required to provide minor incentives to achieve sales." These incentives were not minor. For example, in order to consummate the sale with Zoufaly, the plaintiff Evandro Santini was required to advance cash at the closing because he had to purchase Zoufaly's prior residence. Zoufaly assumed an existing mortgage of $300,000 on the new house (on which Santini remained liable), Santini took back a second mortgage in the amount of $150,000, and a third mortgage in the amount of $45,000.

for many years and is hazardous to human health."[3] Significantly, the defendant's own expert, William N.

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[3]The majority contends that my statements are unsupported by the record. First, common sense would dictate that no one in his or her right mind would want to purchase a house next to or near a site that could be developed as a radioactive waste facility. Further, this court can take judicial notice of this fact. See C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) (§6.1.2-(a) ("[j]udicial notice is a function that appertains to every court, from the lowest to the highest, both trial and appellate").

Moreover, the majority ignores the expert witnesses for both the plaintiffs and the defendant who testified regarding the effect of the June 10, 1991 announcement on the value of the houses and property. Bruce Cagenello, a real estate broker who was testifying on behalf of the plaintiffs, addressed the announcement's effect on the market for the property. He opined that "the property was definitely dysfunctional at that time. The market is made up of willing buyers and willing sellers. In fact, one of the definitions of value is what a willing buyer is willing to pay for a property and what a willing seller is willing to sell a property for without any gun to their heads. And there just was no buyer at that point for this property . . . ." Cagenello added that "[t]he fear – fear is a big demotivator and a motivator, and people – I think everyone can relate to the fact that when you buy a home, you want to make sure that your investment is not going to be lost – and fear of safety, fear of values. And this particular project was right on top of the site, and it was the site. It wasn't a nearby site. I mean, everyone in the area, from people with whom I talked, were concerned about that whole area, but when you're talking right on the site, you were not going to be – in my opinion, be able to sell it on a functional market." Ronald Gingerich, the director of the low-level radioactive waste program for the defendant conceded that he "heard from the real estate board for that area at a hearing sometime after the siting announcement . . . that it basically brought the real estate market close to . . . the sites to a halt." Edward Heberger, a real estate appraiser who was testifying on behalf of the plaintiffs evaluated the value of the Pinney Street property and concluded that "[the plaintiffs] probably couldn't sell the property for two years because of the designation and the stigma period thereafter. And I felt it was a twenty-four month period." Regarding Ellridge Estates, Heberger stated that the fair market value from June, 1991, to June, 1993, was

[footnote continued]

Kinnard, Jr., testified that it was impossible for the plaintiffs to sell houses on the investment property (and, hence, generate any revenue) for two years after the announcement.[4] Even the majority grudgingly

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"[e]ssentially zero . . . . [T]here could have been some residual value there, but very little could be done with it."

The defendant's own expert witnesses acknowledged that the announcement had a negative impact upon the investment value. Donald E. Mullane, a real estate appraiser, made his assessments of the value based on the assumption that the designation issue would be resolved by rescinding the designation. He noted that "the market went into paralysis. Pending some sort of resolution [regarding] what was going to happen with these sites." Leonard Sucsy, a real estate developer who was called to testify for the defendant, agreed that the designation could have prevented the house and property sales at Ellridge Estates. William N. Kinnard, Jr., a property evaluation consultant and real estate market analyst, appraised the fair market value of the Ellridge Estates property after the announcement. Referring to a report he helped prepare on the project; see footnote 4 of this dissent; Kinnard testified that "no sales [of the Ellridge Estates property] could reasonably have expected to have occurred and no development activity on the Pinney Street property could reasonably have been expected to occur" during the designation period. He further testified, summarizing his previous deposition testimony, that there was a negative impact on sales of the investment property because there was "one chance in three" that it would be chosen as the ultimate site and "it simply doesn't make sense to go voluntarily into an area in which there is a reasonable possibility – reasonable probability as perceived at that time that the property would be taken through eminent domain proceedings."

[4]At the state's request, Kinnard, together with Mary Beth Geckler of the Real Estate Counseling Group of Connecticut, developed a "Summary Appraisal Report and Estimate of Damages." As part of this report, they assessed the effect of the June 10, 1991 designation of the properties as a potential site for a low-level radioactive waste disposal facility until this designation was rescinded in May, 1992. They concluded that "[d]uring that period of time, no sales of any portion of Ellridge Estates (vacant lots with the designated site area of the facility; or vacant

[footnote continued]

acknowledges that "[t]he announcement caused some negative effects on the [plaintiffs'] real property sales . . . ." This is clearly an understatement. As the plaintiffs aptly stated in the brief that they submitted to this court, "new homes and radioactive waste do not mix."

Indeed, as the trial court specifically found and the majority conveniently ignores, for the period when the investment property was designated as one of three possible parcels as a repository for radioactive waste, the plaintiffs suffered significant damages. The trial court found as a result of the announcement that the diminution of value of the Ellridge Estates portion of the investment property amounted to $650,000, and the diminution of the Pinney Street portion amounted to $65,000, in all $715,000.[5] The opinion of both the maj-

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houses, immediately abutting the designated site area) could reasonably be expected to have occurred. Moreover, no development activity on the Pinney Street property could reasonably have been expected to occur." Kinnard reiterated this conclusion in his testimony before the trial court. See footnote 3 of this dissent. The report also concluded that the general decline in market demand occurring at the time was compounded by the announcement. Kinnard and Geckler, in the report, "concluded that the [defendant's] announcement resulted in an effective delay or hiatus in marketing and development activities for the [investment property] of an additional nine (9) months. In brief, we have concluded that the most likely start-up date for effective marketing and sales in the 3 segments of the [investment property] in Ellington would be June 1993. That is the end of the Second Quarter of 1993, and 24 months from the [defendant's] announcement date." Thus, the state's own expert witness concluded that the announcement in combination with general market conditions made marketing and sales activities impossible for two years.

[5]The trial court found "that the total diminution in value of the twelve Ellridge Estates lots was $480,000. The loss for the lots outside the notice areas would have been $170,000 but of course they were not part of any suggested taking. The court

[footnote continued]

ority and the trial court can be understood only if compensation for the "stigma period" is rejected. This, however, requires that we ignore clearly defined federal law. "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church v. Los Angeles County*, supra, 482 U.S. 321; see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 n.17, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

Both the federal and state constitutions explicitly provide that, when the state takes private property for public use, it must pay "just compensation" for this invasion.[6] Notwithstanding the obvious nexus between the announcement and the undisputed harm that the plaintiffs have suffered, the majority believes that the defendant was not required to provide the plaintiffs with "just compensation." The majority reaches this conclusion for the following reason: the defendant did not possess "a fixed and irreversible intent to take the

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finds that the total diminution of the Pinney Street property if the sate were liable was $65,000 for a twenty-four month period. That time period includes the so-called 'stigma period.' "

[6]"The Fifth Amendment provides 'nor shall private property be taken for public use, without just compensation,' and applies to the States through the Fourteenth Amendment." *First English Evangelical Lutheran Church v. Los Angeles County*, supra, 482 U.S. 310 n.4. Article first, §11, of the Connecticut constitution provides: "The property of no person shall be taken for public use, without just compensation therefor." The majority "assume[s] for the purposes of this appeal that article first, §11, of our state constitution affords the same protection as that provided under its federal counterpart."

plaintiffs' [investment] property," as opposed to one of the two other finalist locations. I recognize that the majority's reliance upon the "fixed and irreversible intent" finds support in a case that this court decided twenty-five years ago. See *Textron, Inc. v. Wood*, 167 Conn. 334, 348, 355 A.2d 307 (1974). In my view, however, this reliance finds no support in the constitution, in common sense, or in the interests of justice. Accordingly, I believe that we should take this opportunity to reject the fixed and irreversible intent standard.

" '[T]he Constitution measures a taking of property not by what a State says, *or by what it intends [to do]*, but by what it *does*.' *Hughes v. Washington*, 389 U.S. 290, 298 [88 S.Ct. 438, 19 L.Ed.2d 530] (1967) (Stewart, J., concurring) . . . see *Davis v. Newton Coal Co.*, 267 U.S. 292, 301 [45 S.Ct. 305, 69 L.Ed. 617] (1925)." (Emphasis altered.) *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652-53, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting). This is the only sensible approach to the law of takings. If the state has destroyed the value of a person's property, no difference of constitutional magnitude inheres in the question of whether the state intended to do so. Under our law, the requirement of a particular state of mind is appropriate only when we are attempting to determine whether a transgressor was morally responsible for a harmful act, and hence deserving of punishment. The takings clause of the constitution is not a criminal sanction; the courts are not asked to find the state "guilty" of a taking. Instead, the mens rea of the state – assuming that it can be divined – has nothing to do with an individual's right to invoke the constitutional guarantee of just compensation for harms inflicted by the state.[7]

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[7] Even if it were rational to focus upon the intent of the state, it would nevertheless be irrational to embrace the criterion

[footnote continued]

The majority concedes that "[i]t is undisputed that the selection process narrowed the defendant's range of choices to three potential sites" – one of which was the investment property – "with one of the three to be selected as the ultimate disposal site" of radioactive waste. The majority also concedes that the announcement caused "some[8] negative effects" on the plaintiffs' real property sales. In the face of these two facts, the majority nevertheless argues that the plaintiffs are not entitled to just compensation, because "it was not certain" that the investment property – as opposed to one of the other two finalist locations – would be selected for the disposal of radioactive waste. This is like saying that Russian roulette is a harmless entertainment, because "it is not certain" that the gun will fire a fatal shot when you pull the trigger. It literally is true, but it is worlds apart from not having a loaded gun aimed at your temple in the first place. Although it was not 100 percent "certain" that the investment property would be used for the disposal of radioactive waste, there was a one-in-three chance that the state would put it to that use. These odds were less than a sure thing, but they were more than enough to deter any rational buyer from purchasing a house from the plaintiffs.

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of a "fixed and irreversible" intention. "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." *San Diego Gas & Electric Co. v. San Diego*, supra, 450 U.S. 657 (Brennan, J., dissenting); see id. ("the temporary [and] reversible quality of a regulatory 'taking' [does not] render compensation for the time of the 'taking' any less obligatory"). If a taking need not be permanent and irrevocable, I am at a loss to understand why the state's intent to commit a taking must be fixed and irreversible, as the majority claims, before a private property owner may recover just compensation.

[8]The adjective "some" is used by the majority notwithstanding the trial court's finding of $715,000 damages.

Finally, my colleagues in the majority argue that the rule that they embrace comports with public policy. On this point, as with many others, I agree with the response of Justice Brennan, who, in the very context of the takings clause, made the following eloquent statement: "[T]he applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in doing so. See *Watson v. Memphis,* 373 U.S. 526, [537-38, 83 S.Ct. 1314, 10 L. Ed.2d 529] (1963)." *San Diego Gas & Electric Co. v. San Diego,* supra, 450 U.S. 661 (Brennan, J., dissenting). It is for this reason that my colleagues in the majority bark up the wrong tree by attempting to balance a constitutional wound to an individual's interest in private property against what the majority characterizes as "good sense" and "sound public policy."[9]

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[9] As Justice Brennan stated in his dissent in *San Diego Gas & Electric Co. v. San Diego,* supra, 450 U.S. 661 n.26, "[e]ven if I were to concede a role for policy considerations, I am not so sure that they would militate against requiring payment of just compensation. Indeed, land-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits. Dunham, 'From Rural Enclosure to Re-Enclosure of Urban Land,' 35 N.Y.U.L. Rev. 1238, 1253-1254 (1960). Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. Cf. *Owen v. City of Independence,* 445 U.S. 622, [651-52, 100 S.Ct. 1398, 63 L.Ed.2d 673] (1980). After all, if a police-

[footnote continued]

Accordingly, I dissent.

MCDONALD, J., with whom BERDON, J., joins, dissenting. I join in Justice Berdon's dissent. The holding of the majority that governmentaction must be irreversible to be a taking of private property has much to commend itself in terms of certainty. The majority, however, fails to properly recognize the rights of owners who are affected in a dramatic and adverse way by the government's action, even temporarily.

When *Textron, Inc. v. Wood,* 167 Conn. 334, 355 A.2d 307 (1974), upon which the majority relies, was decided in 1974, Justice Brennan had yet to begin his crusade in the United States Supreme Court to bring temporary takings within the takings clause of the United States constitution. It was not until Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 636, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), which later became law in *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), that temporary takings were recognized under the takings clause of the United States constitution. In *First English Evangelical Lutheran Church,* the ordinance denied the appellant all use of its property temporarily, and the United States Supreme Court held that invalidation of the ordinance was not a sufficient remedy for the property owner. Id., 319. The court held that takings, even when temporary, must be compensated. Id., 318.

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man must know the Constitution, then why not a planner? In any event, one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners. Cf. id., [656]."

In *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the United States Supreme Court clarified the factors causing a government regulation to become a taking: (1) the economic impact of the regulation on the property owner; (2) the regulation's interference with the property owner's investment backed expectations; and (3) the character of the governmental action.

In the case before us, notwithstanding the fact that the property later was not chosen as the site for the disposal of radioactive waste, the plaintiff property owners, Evandro S. Santini and Santini Homes, Inc., suffered severe economic impact, totally interfering with their investment backed expectations to develop the property for residential purposes. In 1991, there were three operating low-level radioactive waste disposal facilities, in Washington, Nevada and South Carolina, that alone accepted all of the low-level radioactive waste produced nationally. Like people in the remaining states who opposed siting designations in their own states, the people of Connecticut never welcomed such a site within this state. The resistance to the introduction of a "low-level" radioactive waste site anywhere in Connecticut shows beyond rational argument that individuals would not seek to purchase homes and live near such a site. Common sense dispels any argument that the designation of the plaintiffs' property as one of these sites did not totally interfere with the plaintiffs' investment backed expectations to develop the property for residential purposes. The trial court's finding that the evidence before it did not require such a conclusion is clearly erroneous. See, e.g., *Poulos v. Pfizer, Inc.*, 244 Conn. 598, 616, 711 A.2d 688 (1998). It is

simply inconceivable that a "Chernobyl[1] Estates" could be a successful real estate development in Connecticut. Thus, I conclude in light of *Penn Central Transportation Co., First English Evangelical Lutheran Church* and, more recently, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), that when, because of the impact on their distinct investment backed expectations, property owners like the plaintiffs are forced to sacrifice all economically beneficial uses of their property, even temporarily, a taking that requires just compensation has occurred.

Accordingly, I dissent.

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[1] Chernobyl, in the Ukraine region of the former Soviet Union, was the site of a nuclear meltdown on April 26, 1986, that resulted in the release of deadly radioactive material into the atmosphere.

APPENDIX B

SUPERIOR COURT
JUDICIAL DISTRICT OF
HARTFORD/NEW BRITAIN
AT HARTFORD

No. 0094-0538646 S

EVANDRO S. SANTINI, et al.,

VS.

CONNECTICUT HAZARDOUS
WASTE MANAGEMENT SERVICE

July 13, 1998

MEMORANDUM OF DECISION

Plaintiffs being this action claiming a temporary taking of their properties by inverse condemnation.

The defendant, Connecticut Hazardous Waste Management Service (Service), is a state agency acting under authority granted to it under C.G.S. §22a-163. It does not have the power to acquire property. That power rests with the Commissioner of Public Works. C.G.S. §22a-163W(b) and (c).

Defendant has denied many of the pertinent parts of plaintiffs' complaint and filed four special defenses as follows:

First, no action for inverse condemnation may be brought against a state agency, such as defendant, which does not have the power of eminent domain; Second, sovereign immunity; Third, an owner of real property is not entitled to be paid for reduction in the value of his property for a valid exercise of the state's police power; Fourth, the public duty doctrine.

Defendant has also moved to dismiss this action for failure of plaintiffs to make a prima facia case.

FACTS

One plaintiff is Evandro S. Santini (Evandro) who has been a developer and builder of single family homes and rental apartments in the Towns of Tolland, Vernon, Ellington and Coventry for many years. He is the President and Treasurer of the other plaintiff Santini Homes, Inc. (Homes), a Connecticut corporation that is in the construction business. It is as so-called Subchapter S corporation for federal income tax purposes and Evandro derived income or loss on a pass-through basis from Homes.

From 1985 through 1991, the plaintiffs were engaged in the possible development and construction of a subdivision known as Ellridge Estates.

In 1985, Evandro purchased 20 acres of land adjacent to Abbott Road in Ellington for $147,500. The property was, and remains, zoned for single-family residential development on lots of at least 30,000 square feet if served by sewers and 40,000 square feet with on-site septic systems. That property at that time was located within the Town of Ellington's sewer district, making it eligible for connection to the Ellington public sewer system. Water supply was available to that property.

There are no wetlands or other environmental obstacles to residential development of the 20 acres. The land is located across Abbott Road from the Ellington Country Club, an 18 home golf course and full scale country club.

In 1985, the plaintiffs obtained from the Ellington Planning and Zoning Commission (P&ZC), subdivision approval for a 16 lot subdivision on these 20 acres. Evandro proceeded to construct the infrastructure of Ellridge Estates, including the water supply connections, drainage improvements, and the access road. In 1985, the plaintiff Evandro was asked by the Ellington Water Pollution Control Authority (WPCA) to install a "capped sewer line" within the subdivision, *i.e.*, a sewage disposal pipe to be constructed beneath the access road to the lots, and to be connected to the public sewer system. He agreed to do so, and installed a "capped sewer" beneath the access road.

In December 1986, Evandro transferred the Ellridge Estates property to Homes for $864,000.

The real estate market began to deteriorate in 1987.

In March 1988, Evandro purchased the adjoining 54 acre parcel, which has several hundred feet of frontage on a Town road called Pinney Street, for $1,075,000. Ten acres of this property, located within 600 feet of Pinney Street, was, and remains, zoned for multi-family residential use. The balance is zoned for single-family homes in the same manner as the 20 acre parcel. This property in 1998 was also in the Town's sewer district, had available water supply connections, and contained no wetlands or other environmental obstacles. At the time of purchase, the Evandro terminated agricultural use of the Pinney Street property.

With the purchase of this second parcel, the plaintiffs had in place the land for a proposed Santini Village (Village). They proceeded with their strategic plan, which was to establish luxury homes on the 16 lots in Ellridge Estates and then proceed with residential development of the remaining 54 acres of Village, sometimes known as "Ellridge Estates II," with smaller lots and less expensive single-family homes. The plaintiffs also considered at times multi-family development on the ten acres closest to Pinney Street.

In late 1987, Homes began construction of two model homes on lots in the 16 lot subdivision. This construction proceeded slowly. In 1989, Homes began construction of two more model homes. From late 1989 through the Spring of 1991, construction of the infrastructure of the subdivision continued. No houses were sold prior to the notice. In late 1990 and early 1991, Evandro secured the financial means to lend or give money to Homes so that it could proceed with sales and construction of additional homes in Ellridge. He used the substantially increased income from his newly built rental complex in Vernon as security to borrow more than $20 million from Prudential Insurance Company, Manufacturers Life and the New Connecticut Bank and Trust/FDIC. The average interest rate of these loans was approximately 9 percent. In addition, in March 1991, Society for Savings, the construction lender for Ellridge, established a mortgage loan program with favorable terms for several residential properties, including Ellridge. This availability of mortgage money for residential buyers was uncommon at that time, and may have indicated the beginning of the end of what had been called the "credit crunch" of 1989-90.

In March 1991, the Ellington WPCA removed all but ten acres of the Ellridge property from the town's sewer district. This affected the Ellridge subdivision by rendering the sewer line, installed at the Town's direction and approval, useless, and by devaluing to a degree the lots, but because Ellridge had been approved with septic systems, construction and values there were not substantially affected. This action did devalue the adjacent 54 acre Homes property.

On June 10, 1991, defendant announced that the Ellridge property was one of three candidate sites for the construction of a disposal facility for low-level radioactive nuclear waste. About two weeks later it identified five back up sites in other areas. One of the many steps required before a site was selected for taking by eminent domain was the recognition of one of the three possible sites as a "preferred site". That was never done.

Such waste remains radioactive for many years and is hazardous to human health. The service designated 250 acres in Ellington as a candidate site; this acreage included all of the Homes 54 acre Pinney Street parcel and all 12 of the approved and completed subdivision lots not yet built upon. The boundary of the proposed facility did not include the four constructed single-family homes in Ellridge. Part of the access roads within Ellridge that were to serve the twelve empty lots were part of the candidate site.

There is no evidence that defendant had filed any notice or lien on the Ellington land records in regard to the designation.

The site designation process was secret. The plaintiffs did not know of the proposed site selection process before the notice announcement.

Funding for the Service's low level radioactive waste program does not come from the State of Connecticut's general revenues or a special appropriations. It is funded (with the exception of money for land acquisition, the source of which the legislature had not decided in 1991 and still has not resolved) from the "Low Level Radioactive Waste Fund", which consists of assessments on institutions within the state, that generate low level radioactive waste under Conn. Gen. Stat. §22a-163o. The Department of Environmental Protection controls this fund and assesses generators based on the value of disposal from the previous year at rates determined according to a budget prepared by the Office of Policy and Management and approved by the legislature.

Announcement of the three candidate sites was noted in the community of Ellington. It had some negative effect on real property sales in the vicinity of the three candidate sites. Homes had some difficulty in selling constructed homes on the four lots outside of the designation area. The first four lots of the subdivision being already under construction for residential use, the remaining twelve lots were clearly committed to subdivision use and any alternative use of the property would be clearly "second best". When home sales resumed, the plaintiffs were required to provide minor incentives to achieve sales.

The plaintiffs were unable to proceed with residential development, and thus obtain funds from sales to pay down their debts, because any additional construction might not have been compensable in eminent domain proceedings if the sites were eventually taken.

In early November 1991 the plaintiffs began to negotiate with a Jeffrey Zonfaly, also known as Jeffrey Zee (Zonfaly), in regard to the purchase of one of the four

houses (Lot 16). Zonfaly began the negotiations at about "half the price". Zonfaly's wife was then expecting a child. Homes and Zonfaly agreed as to the purchase of the house on or about April 23, 1992. Zonfaly closed on that house on August 11, 1992, for $530,000. In June 1997 Homes bought the house back form Zoufaly for $460,000 or $470,000.

In December 1991 that house was appraised for $400,000 by an appraiser who took the notice into consideration.

After talking to Zonfaly but before the recission of the notice, plaintiffs also talked about the purchase of one of the four houses with a James Wysocki who offered "in the middle of the $300's," i.e. the mid $300,000 range. Wysocki offered a $50,000 deposit. Homes refused the offer.

Plaintiffs had offered the houses originally for $500,-00 each more or less. Between 1989 and March 1991 Homes had lowered the asking price of each of the unsold homes by $50,000.

Edward Heberger, a Connecticut real estate appraiser made his appraisal in August 1995 and recently updated it. That appraisal separates the economic effects of the Service's designation from other conditions of the market for real estate and residential development in Connecticut during 1991 and the following years, and separates the effects of the removal of most of plaintiffs' property from the Town's sewer district in March 1991 from the effects of the Service's June 1991 action.

Mr. Heberger also determined a reasonably probable profit margin and absorption period for the homes to be constructed.

The appraisal states that just prior to the designation, the property was worth more than $2.6 million and that after the designation, this value effectively vanished. The appraisal calculates the financial impact to be $650,000 for delayed fair market value on the real property and homes, and $240,000 for delayed construction profits from the sale of single-family homes in Ellridge Estates. Finally, the report calculates $65,000 in damage for delayed value of the Pinney Street land, for a total of $955,000.

Plaintiffs also will offer at trial the testimony and report of Thomas W. Henry, MAI. Mr. Henry appraised both the Ellridge Estates and Pinney Street parcels to determine their fair market value only for agricultural purposes. He found Ellridge had none as of June 11, 1991. As to the Pinney Street land, Mr. Henry said that for agricultural use before the designation it was worth $110,000 and after it was worth $55,000.

PLAINTIFFS

Both Evandro and Homes bring this action. At the time suit was brought Homes owned the 16 lot subdivision and Evandro owned the 54 acre Pinney Street property. Money was given or lent without interest by Evandro to Homes. Each of these entities might be entitled to be paid for a taking of property but only of its own property. Throughout plaintiffs' brief they speak of "their property" and do not seem to distinguish the two parties.

There was no claim of an "alter ego" here. *Zaist v. Olsen,* 154 Conn. 563. As far as compensation for a pure taking each might be compensated for the taking of its own property. However, as to any possible profits

the court cannot separate the two and even if such profits were legally chargeable, could not mathematically award profits.

LAW

I. Re: Liability

A. Categorical Taking

Plaintiffs allege that the designation of the area of the 12 lots of the subdivision and the Pinney Street site as one of three finalists for acquisition as a low-level radioactive waste disposal facility is a taking. They rely heavily on the case of *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003. In that matter the defendant council acted on a state statute that prohibited building in coastal areas under certain conditions. The plaintiff Lucas owned property in such an area for two years before the statute was enacted. He was refused a building permit for his land.

The U.S. Supreme Court held that where the governmental action leaves "the owner of land without economically beneficial or productive options for its use" that is a taking. Id. 1018. It also held that Lucas' land, under the statute, had no economic or productive use. Our Connecticut cases call this a confiscation test and say it is no different from *Lucas. Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 221, 255 fn.17; *Dooley v. Town Plan & Zoning Commission*, 151 Conn. 304, 311-312; *Danforth v. United States,* 308 US 271-285. This is not the situation here.

None of the experts said plaintiffs' land had no economic or productive use except one expert said that the Ellridge had no agricultural value and the Pinney Street land had lost one-half its value as agricultural land.

The court finds both Ellridge and Pinney Street did have use and value after the notice.

B. Designation

The defendant did not designate plaintiffs' property to be taken by the state but only that it was one of three properties under consideration for taking. The defendant also identified for the public five "back-up" sites. The selection of three from which only one was to be taken was part of the state's planning process. Such planning is not actionable. *Textron, Inc. v. Woods,* 167 Conn. 334, 346; *Smith v. City of Brenham, Tex.,* 865 F2d 662, 663-664.

"The rule is firmly established in this state that where no land is physically taken and no interest in it which the law recognizes is extinguished or affected in a manner detrimental to the owner, the prohibition contained in Article First, §11 of our Constitution against taking of property for public use without just compensation does not apply." *Benson v. Housing Authority,* 145 Conn. 196, 200.

"A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States,* 308 U.S. 271, 285 (1939).[1]

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[1] The *Lucas* opinion would indicate that the U.S. Supreme Court majority did not consider this case.

II. Damage

If damages were to be awarded they would be for the loss of use of the twelve lots in the Ellridge subdivision and the Pinney Street property for the time in which the designation of the three sites existed.

A. ELLRIDGE

The court finds that the total dimunition in value of the twelve Ellridge Estate lots was $480,000. The loss for the lots outside the notice area would have been $170,000 but of course they were not part of any suggested taking.

B. PINNEY STREET

The court finds that the total dimunition of the Pinney Street property if the state were liable was $65,000 for a twenty-four month period. That time period includes the so-called "stigma period".

The idea of a "stigma period" was raised in *Lucas* which said, "Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. But 'where the [regulation has] already worked a taking of all use of the property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.' " *Lucas,* 1030 f.n. 17 (citation omitted). That is not our situation.

There is law to the effect that a temporary taking may occur where the state goes beyond mere planning and gives "some definitive indication that the state's intent to condemn the property in question has become fixed

and irreversible." *Textron, Inc. v. Wood,* 167 Conn. 334, 348. There is no such evidence in this case.

C. FEAR FACTOR

In regard to the possible taking of any of the property not designated i.e. the four houses, plaintiffs seem to rely on the fear factor. Speculative fear does not even allow an injunction for nuisance. *Nicholson v. Connecticut Half-Way House, Inc.,* 153 Conn. 507, 511.

D. PROFITS

Plaintiff claims lost profits and compensation for a taking. The potential for profits from the development of the land would be part of the considerations taken into account in setting the value of the property for condemnation purposes but may not be given in addition. *Laurel, Inc. v. Commissioner of Transportation,* 180 Conn. 11, 37-48.

E. STIGMA PERIOD

First, the plaintiffs have failed to sustain their burden of proof that a "stigma period" existed after the legislature amended the statute and terminated any threat of a taking.

Second, the plaintiffs have failed to sustain their burden of proof that the enactment of the corrective legislation did not end any problems in regard to a threat of a taking as of that date.

Third, the effect of the so-called "stigma period" is produced by unreasonable fear i.e. the "subjective apprehension" of another. That is not compensable. *Nicholson v. Connecticut Half-Way House, Inc.,* 153

Conn. 507, 512 (not grounds for injunction); *Wood v. Wilton*, 156 Conn. 304, 312. (A "speculative and intangible fear".)

SPECIAL DEFENSES

First, state actions are capable of consisting a taking even though eminent domain is never used. *Lucas* supra.

Second, the defense of sovereign immunity is not applicable to unconstitutional state actions. *Horak v. State*, 271 Conn. 257, 261.

Third, if the state acts unconstitutionally and a taking of all or substantially all of the economic or productive use of the property is destroyed suit may be brought. *Lucas*, supra.

Fourth, if the state has a public duty in some particular circumstances it can act to fulfill it but not beyond the point of rendering a citizen's property essentially uneconomically beneficial or productive for use. *Lucas*, supra.

III. CONCLUSION

The court is convinced that in all probability the notice did not result in a practical confiscation of land, either permanently or temporarily. But we go beyond that to the tests as set out in *Bauer v. Waste Management of Connecticut, Inc.*, supra 256-257. The court has gone over those and concludes under the facts of our case there was no unconstitutional taking of any kind.

Judgment for defendant.

/s/ N. O'Neill
O'Neill, J.

APPENDIX C

JUDICIAL DISTRICT OF HARTFORD
AT HARTFORD

EVANDRO S. SANTINI, ET AL.

VS.

CONNECTICUT HAZARDOUS
WASTE MANAGEMENT SERVICE

November 17, 1998

ARTICULATION

Under *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 227, 256-257 in cases like this which do not result in a practical confiscation of a plaintiff's property the court is to give consideration not only to the degree of diminution in the value of the land but also to the nature and degree of public harm prevented or, as in our case, to be prevented. The court must also examine alternatives available to the landowner. As was stated in the court's memorandum all that was done.

In addition of course the court balanced the financial effect on the plaintiff against the danger to the health safety and welfare of the people of our state because the issue is so important. As the plaintiff said in its

post-trial brief, page 7, "This court therefore should balance the government's reasons for proceeding with the site selection process with the impact on the Santini's only of it concludes that the June 1991 designation left the plaintiffs with a valuable, economically viable use of their property.

This the court did.

/s/ N. O'Neill, J.
N. O'Neill

STATE OF CONNECTICUT
SUPREME COURT

NO. SC 16023

EVANDRO SANTINI ET AL.

v.

CONNECTICUT HAZARDOUS WASTE
MANAGEMENT SERVICE

DECEMBER 13, 1999

ORDER

THE MOTION OF THE PLAINTIFFS, FILED NOVEMBER 19, 1999, FOR RECONSIDERATION AND REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IS HEREBY O R D E R E D DENIED.

BY THE COURT,

/s/ Francis Drumm
CHIEF CLERK

NOTICE SENT: DECEMBER 13, 1999

Supreme Court, U.S.
FILED
MAY 02 2000
CLERK

No. 99-1592

In The
Supreme Court Of The United States
October Term, 1999

EVANDRO S. SANTINI, ET AL.,
Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO WRIT OF CERTIORARI

The Connecticut Hazardous Waste Management Service hereby objects to the petition for a writ of certiorari filed by Evandro S. Santini and Santini Homes, Inc.

JURISDICTIONAL STATEMENT

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a) but jurisdiction does not exist under this statute to review this matter.

STATEMENT OF THE CASE

On June 10, 1991 the Connecticut Hazardous Waste Management Service ("Respondent" or "CHWMS") announced that three parcels of land in and around Ellington, Connecticut were being considered for a potential disposal facility for low-level radioactive waste. One of the sites included land owned by Evandro S. Santini and Santini Homes, Inc. (hereinafter collectively known as the "Petitioners" or "Santini"). Petitioners sued claiming that the announcement constituted a temporary taking of their property under Article First, Section 11 of the Connecticut Constitution.

After a trial on the merits, judgment was rendered in favor of the Respondent. *Id.* at 51a. The trial court held as a matter of law that the Service had engaged only in planning and preparatory activities which did not amount to a taking under Connecticut law. *Id.* at 42a. Furthermore, the trial court found that, as a matter of fact, even if the Service's activities went beyond planning, a taking did not occur because the Petitioners retained use and value in their property. *Id.*

Petitioners appealed to the Connecticut Appellate Court. The Connecticut Supreme Court, however, granted a direct appeal and upheld the trial court. *Id.* at 27a.

The Petitioners now seek review before this Court.

SUMMARY OF THE ARGUMENT

This petition for certiorari should be denied because 1) the Complaint and the decision below were based solely on state law and therefore there is no federal question within the meaning of 28 U.S.C. § 1257; and 2) the petitioners' claims are based entirely on a view of the facts that has already been rejected by the trial and appellate courts below.

ARGUMENTS

A. The Decision Was Based On State Law.

The relevant statute, 28 U.S.C. §1257, permits a writ of certiorari if, *inter alia*, a state supreme court has decided erroneously a question of a right protected by the United States Constitution. Similarly, Rule 10 of this Court requires that a party seeking a writ of certiorari demonstrate the existence of a substantial question of federal law. No such question exists here for the reason that this case was decided under the terms of the Connecticut Constitution.

Petitioners original complaint seeks redress for "inverse condemnation without just compensation, in violation of Article I, § 11 of the Connecticut Constitution ...." No mention of a claim under the United States Constitution is ever made. Consequently, the Connecticut Supreme Court stated that the "dispositive issue in this appeal is whether mere governmental planning may constitute a taking ... under Article first, § 11 of the Connecticut Constitution." Furthermore, the decision adds that "[t]he

plaintiffs brought their claim of inverse condemnation solely under the Connecticut constitution and, therefore, we limit our analysis to that provision." Pet. App. at 18a.

For many years this Court has held to the position that :

> The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, "on the limitations of our own jurisdiction."

Michigan v. Long, 463 U.S. 1032, 1041-1042 (1983). In this case, because of the plaintiffs' determination to bring this case on state constitutional grounds, the Connecticut Supreme Court has not addressed a question of federal law, but a question of the interpretation of Connecticut Constitution. Thus, no reason exists for this Court to review this case.[1/]

1/ Because this case was presented and decided solely under Connecticut law, petitioners' assertion that the Connecticut Supreme Court ignored controlling federal law is irrelevant. Nevertheless, it is also incorrect. As the Connecticut Supreme Court explained: "In the plaintiffs' view . . . when the United States constitution is interpreted to grant rights thereunder, our state constitution must be interpreted to grant at least the same level of protection as that granted by the federal constitution. What is meant by that doctrine, however, is irrelevant in this case. None of the parties argues that our state constitution provides different protection for property owners from that afforded by the federal constitution. Furthermore, we are not aware of any doctrine, cases or reason that would compel, in the context of this case, the treatment of the plaintiffs' state constitutional claims different than the treatment those claims would have been given had we been adjudicating the plaintiffs' claims under the federal constitutional takings jurisprudence. We, therefore, assume for the purposes of this appeal that article first, § 11, of our state constitution affords the same protection as that provided under its

B. Petitioners' Factual Claims Have Been Rejected By Each Court Below.

In their brief, Petitioners make numerous statements that could lead one to believe that the June 10, 1991 announcement caused them to lose all use and value in their land. For example, Petitioners use phrases like "economically idled" and that the subject property was left "without economic use." It is based upon this slanted and mistaken view of the facts that Plaintiffs then claim that a taking occurred.

To the contrary, each court below has found that the petitioners did not lose all use and value in their property and that a taking did not occur.

Specifically, the trial court found that the announcement of siting consideration was made on June 10, 1991 but that for a two year period preceding the announcement Santini was unable to sell homes in the Ellridge Estates subdivision due to the regional economic downturn. *Id.* at 42a. The announcement itself did not take, or announce an intent to take any property, but only identified three potential sites for further study. *Id.* at 15a. In fact, during the announcement period, the Petitioners began negotiations for the sale of one of the houses, which sale closed on August 11, 1992 for $530,000. Furthermore, in the middle of the siting announcement period, one buyer approached the Petitioners seeking to purchase a home for a sum in the mid-$300,000 range; essentially the same value as given for this home by two different appraisers. *Id.*[2/] It is not

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federal counterpart. " Pet. App. 18a n. 20.

[2/] The Petitioners' Brief suggests that this fact is of no consequence because there was "no meeting of the minds." Pet. Brief p. 29 n 20. The fact that the parties did not agree to a final price is of no

surprising, therefore, that expert appraisal witnesses testified at trial that the land had use and value and, based on this testimony, the trial court concluded that, "both [properties] did have use and value after the notice."[3/]

Finally, the majority of the Connecticut Supreme Court reviewed the record and said:

> [t]he trial court made a critical factual finding adverse to the plaintiffs' claims, namely, that they had not met their burden of proving that the siting announcement deprived their properties of all economically viable use during the period in which they claimed a temporary taking. *Our thorough review of the record indicates that this finding, as well as other critical factual findings adverse to the plaintiffs' claims, are fully supported by the record.*

Pet. App. 17a-18a n.19. (Emphasis added). These "critical factual findings adverse to the plaintiffs' claims" not only helped determine the result below, but make this case utterly unworthy of this Court's consideration.

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consequence. What is of relevance is that at the time when the Petitioners are claiming that their property had no value, a disinterested buyer was offering a substantial sum for a house which had failed to sell for up to two years before the Service's announcement.

3/ Page 7 of Petitioners' Brief states that "all of the expert and fact witnesses agreed that in the wake of the June 1991 announcement, Santini could not generate *any* revenue from his land . . . ." This is not true. As the trial court found: "None of the experts said plaintiffs' land had no economic or productive use except one expert said that the Ellridge had no agricultural value. . . ." (Pet. App. 47a.)

In short, notwithstanding the Petitioners attempt to change the underlying facts in this case to suit their ends, the trial court and the majority of the Connecticut Supreme Court agree that the record supports but one conclusion--that Petitioners retained both use and value in their land.

CONCLUSION

The case before this Court is ill-suited for review for two reasons. The first is that the decision of the Connecticut Supreme Court is based entirely upon Connecticut law. The second point is that the conclusions of law the Petitioners attempt to raise are based on a view of the facts that has twice before been rejected by courts below.

For these reasons, therefore, the Respondent requests that a writ of certiorari be denied.

Respectfully submitted,

RESPONDENT
CONNECTICUT HAZARDOUS
WASTE MANAGEMENT
SERVICE

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APR 28 2000

(3)

No. 99-1592

IN THE

SUPREME COURT OF THE UNITED STATES

EVANDRO S. SANTINI, *et al.*,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

The National Association of Home Builders ("NAHB") has received the written consent of the petitioner to submit this *amicus curiae* brief.[1] The letter of consent has been filed with the Clerk of this Court. Respondents have declined consent.

The NAHB respectfully moves this Court for leave to file its *amicus curiae* brief in support of petitioner because it wishes to bring to the Court's attention a disturbing trend exemplified by the petitioner's case – the failure by state courts to follow this Court's lead in properly analyzing regulatory takings cases and a failure by these courts to take into any consideration a landowner's distinct investment backed expectations before reaching a decision on a takings claim. In fact, this case represents what can be categorized as the extreme end of this trend, with a court effectively writing out of existence the entire concept of a regulatory taking.

The NAHB represents over 200,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, commercial and industrial

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before this Court as an *amicus curiae* or as "of counsel on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981);[2] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[3] *Pennel v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitun v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Montery*, 526 U.S. 687 (1999).

Christopher Senior

[2] Justice Brennan's dissent cited approvingly the NAHB brief. 450 U.S. at 643 n.6.

[3] The Court opinion cited approvingly the NAHB brief. 483 U.S. at 840.

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SUMMARY OF ARGUMENT

To find a regulatory taking one must generally either allege the loss of "economically viable use" of property or failure of a governmental entity to "substantially advance legitimate state interests," a test grounded in constitutional reason and Supreme Court precedent. When utilizing this test, a reviewing court looks squarely at the effect of the government action upon the property interest, not the stated or inferred governmental intent behind the action. The court below has chosen to skirt the required review of the impact upon the property owner, and instead give a mere cursory look to the governmental unit's 'intent' – finding that intent alone determines whether a regulatory taking has occurred.

By rewriting this Court's regulatory takings analysis, the lower court has removed from judicial consideration any review of a property owner's "distinct investment backed expectations," tossing such questions aside whenever it deems that the government intended no taking – regardless of the actual financial impact upon the property owner. This novel approach to takings jurisprudence effectively shields governments from potential liability for regulating Fifth Amendment property rights so long as they 'intended' to do something else.

REASONS FOR GRANTING THE WRIT

I.
BY FOCUSING ON THE INTENT BEHIND A GOVERNMENTAL ACTION RATHER THAN ITS EFFECT ON PRIVATE PROPERTY RIGHTS, THE COURT BELOW REPLACED REGULATORY TAKINGS ANALYSIS WITH A DEEPLY FLAWED 'MENS REA' REVIEW NOT APPROPRIATE TO FIFTH AMENDMENT JURISPRUDENCE

That the effect of a governmental action should be the focus of a takings review, rather than the alleged or inferred intent of the governmental actor, is well established.

"[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298 (Stewart, J. concurring). This legal principle is also found in Justice Brennan's dissent in *San Diego Gas & Electric*,[1] and in a fully developed state in the Court's opinion in *First English*, which noted that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide

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[1] *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 652-53 (1981)(Brennan, J., dissenting) (but representing the substantive views of five members of the Court); *See also Yuba National Resources Inc., v. United States*, 821 F.2d 638 (Fed. Cir. 1987).

compensation." [2] State courts have also followed this path. "It is the effect of the state's action that triggers the Just Compensation Clause, not the intent of the government in taking the action which led to the deprivation of private property rights." *Zinn v. State*, 112 Wis.2d 417, 430 (1983).

Indeed, at least two members of the Connecticut Supreme Court also agree.

> If the state has destroyed the value of a person's property, no difference of constitutional magnitude inheres in the question of whether the state intended to do so. . . . [T]he mens rea of the state – assuming that it can be divined – has nothing to do with an individual's right to invoke the constitutional guarantee of just compensation for harms inflicted by the state.

Santini v. Connecticut Hazardous Waste Management Service, 251 Conn. 121, 149 (1999)(Berdon, J., dissenting).

Yet the rest of the Connecticut Court decided instead that the effect of a governmental action on private property rights – no matter how severe – simply does not factor into the judicial equation. Finding that the case involved but the siting of a storage facility for low-

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[2] *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987).

level radioactive waste, the court below deemed the process "mere governmental planning" rather than a "fixed and irreversible decision" to seize property. *Santini* at 140. Since there was no 'intent' to actually take possession of the property, there could be no grounds for a takings claim, so the majority explained.

While the denial of compensation for turning the subject property into what one justice dubbed "Chernobyl Estates" is troubling, much more disconcerting is the exemption from takings review carved out by this decision for cases not found to involve the requisite level of governmental intent. It is not intent which the takings clause of the Fifth Amendment measures, but damage to private property rights.

As this court has noted:

> Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be . . . compensation to sustain the act ... depends upon the particular facts." (citations omitted). Consistent with this understanding, we have described determinations of liability in regulatory takings cases as " 'essentially ad hoc, factual inquiries,' " (citations omitted), requiring "complex factual assessments of the purposes

> and economic effects of government actions." (citation omitted).

City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 720 (1999).

And as recently explained by the Court of Federal Claims:

> Our role . . is not to make policy choices about the best ratio of regulation to individual rights, but to answer the question whether the public must pay for its regulations . . . . If those regulations take property the Constitution gives a simple answer: yes it must. The Founders chose to provide for just compensation, and this court must determine whether the Takings Clause is triggered by the facts before us today.

Florida Rock Industries, Inc. v. United States, 45 Fed. Cl. 21, 24 (1999).

When a court crosses over into efforts to discern 'intent,' it moves to an entirely different analysis most often found in the criminal context. As noted in a dissent from the court below, "a particular state of mind is appropriate only when we are attempting to determine whether a transgressor was morally responsible for a harmful act. . . . The takings clause of the constitution is not a criminal sanction; the courts are not asked to find the state 'guilty' of a taking." *Santini* at 149.

Yet that is precisely the end result of the analysis adopted by the court below – a requirement that the government be found to have the appropriate *mens rea* (and a 'fixed and irreversible' intent at that) before a taking can be found.

To suggest that the *mens rea* takings test adopted by the court below will muddy this Court's existing takings jurisprudence is to speak lightly. The court below declared a series of takings cases – including *Dolan v. Tigard*[3] and *Lucas v. South Carolina Coastal Commission*[4] – inapplicable because none of them involved a government intent only on "mere planning," without any aim to take property.

Such a test is not merely misguided but incompatible with this Court's constitutional interpretations of the takings clause. Allowing it to stand uncorrected puts in jeopardy the existing right of property owners to effect-centered, fact-based hearings on takings claims.

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[3] 512 U.S. 374 (1994).
[4] 505 U.S. 1003 (1992).

II.
BY FAILING TO ANALYZE THE ECONOMIC IMPACT OF THE GOVERNMENTAL ACTION ON PROPERTY INTERESTS, THE COURT BELOW UTTERLY DISREGARDED THE OWNER'S "DISTINCT INVESTMENT-BACKED EXPECTATIONS"

In rejecting other precedents of this Court, the court below ignored what has become one of the central tenets of takings analysis.

"In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

These standards of review are now commonly quoted in takings jurisprudence. "The *Penn Central* inquiry entails an analysis of the economic impact, effect on reasonable investment-backed expectations, and character of the government action. Using these factors, a partial regulatory taking may be found where a regulation results in a deprivation of 'a substantial part but not essentially all of the economic use or value of the property (citation omitted).'" *Florida Rock* at 31.

While certainly reaching different results, courts nationwide consistently recognize the centrality of this analysis. "The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)(Finding a taking); "[P]erhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation?" *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992)(Remanded for application of *Penn Central* standards), *cert. denied*, 514 U.S. 1064 (1995); "Even if the governmental regulation has not entirely destroyed the property's value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations. . . . The reasonable investment-backed expectation of the claimant is critical to this analysis. . ." *Mayhew v. Town of Sunnyvale*, 964 SW2d 922, 937 (Texas 1998)(Finding no taking).[5]

Considering that the general remedy for a taking is compensation, it makes perfect sense for this Court and others throughout the nation to look to an owner's 'distinct investment-back expectations' in order to determine both the degree of damage and to set a proper level of reimbursement for that damage.

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[5] *See generally*, Washburn, *"Reasonable Investment-Backed Expectations" As A Factor In Defining Property Interest*, 49 Wash. U. J. Urb. & Contemp. L. 63 (1996).

Without a factual review of such financial expectations, how would one know that a taking existed, much less how to compensate an owner for their loss? By refusing to explore this question, the court below failed to properly explore the actual impact of the governmental action upon the owner's property rights.

"Although there is no right to recoup one's investment, the inability to do so weighs in [petitioner's] favor, since the regulation consequently places a greater burden on [petitioner.]" *Florida Rock* at 39. It is that consideration which petitioner here has been denied – consideration of the inability to recoup an investment due to governmental action. If this Court does not reaffirm that all courts must take into account 'distinct investment-backed expectations' when reviewing a takings claim, Petitioner, and others like him, face a bleak future before the bench. For if the courts will not take into account a property owner's 'distinct investment-backed expectations' when reviewing a takings claim, who will?

CONCLUSION

For the above reasons, the amicus respectfully requests that this Court grant the Petition for a Writ of Certiorari.

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(4)

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No. 99 - 1592

In the
Supreme Court of the United States

EVANDRO S. SANTINI, *et al.*,
Petitioners,
v.
CONNECTICUT HAZARDOUS WASTE
MANAGEMENT SERVICE,
Respondent.

On Petition for Writ of *Certiorari* to the
Supreme Court of Connecticut

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIÆ*

The New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977.[1] Its membership consists of individuals, businesses, and others who believe in promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic and property rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. E.g., Natsios v. National Foreign Trade Council, 181 F.3d 38 (1st Cir.), cert. granted, 120 S. Ct. 525 (1999); UNUM Life Ins. Co. v. Ward, 526 U.S. 358 (1999); BMW v. Gore, 517 U.S. 559 (1996); Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997); Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996); Conservation Law Foundation v. Department of the Air Force, 79 F.3d 1250 (1st Cir. 1996); Preseault v. United States, 66 F.3d 1167 (Fed. Cir. 1995).

Amicus seeks to bring to the Court's attention its views, and those of its supporters, concerning the scope of the takings clause of the Fifth Amendment to the United States Constitution. If the decision below is allowed to

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that neither counsel for Petitioners nor Respondent authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief.

stand, state courts will continue to apply different standards of review of regulatory takings under the Fifth Amendment to the United States Constitution. Moreover, under the decision below, property owners will be left without recourse to protect their reasonable investment-backed expectations when governmental "planning," rather than regulation, deprives them of the economically beneficial use of their property. These issues are of great significance to NELF's members as well as to property owners generally.

Pursuant to Supreme Court Rule 37.2, counsel for *Amicus Curiae* have secured written consent for the filing of this brief from counsel for Petitioners and Respondent.

SUMMARY OF ARGUMENT

This Court should grant the Petition and take this opportunity to direct state courts and state administrators to apply the Fifth Amendment standards articulated by this Court. The Connecticut Supreme Court failed to apply these standards when it excluded governmental actions it characterized as "mere planning" from Fifth Amendment scrutiny. Where, as here, the "mere planning" by the government results in the two-year economic idling of a fully permitted ongoing residential development, a taking within the purview of the Fifth Amendment has occurred. Moreover, where, as here, the reasonable investment-backed expectations of a property owner have been radically curtailed, just compensation is required. This Court should grant the Petition and reject the Connecticut Supreme Court's exception to the Fifth Amendment for "mere planning" activities.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO MAKE CLEAR THAT STATE COURTS AND STATE ADMINISTRATORS MUST ADHERE TO THIS COURT'S FIFTH AMENDMENT STANDARDS.

Three members of this Court recently observed that state courts, now the primary adjudicators of regulatory takings claims, see Petition at pp. 13-16, do not appear consistently willing "to hold state administrators to the Fifth Amendment standards set forth by this tribunal." Lambert v. San Francisco, 68 U.S.L.W. 3612, 3613 (Mar. 27, 2000) (No. 99-697) (Scalia, J., dissenting from the denial of *certiorari*). Indeed, as Justice Scalia noted, "[t]here is reason to believe that this may be more than a local and isolated phenomenon." Id. This phenomenon is not limited to California. See D. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan and What State and Federal Courts Are Doing About It*, 28 Stet. L. Rev. 523, 524, 551 (1999); R. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?* 6 Fordham Envtl. L.J. 523, 555 (1995); Petition at pp. 24-28. As the Petitioners demonstrate, see Petition at pp. 19-22, the Connecticut Supreme Court has, in this case, also failed to follow this Court's regulatory takings jurisprudence by holding, as a matter of law, that governmental action which is undertaken as part of a planning process cannot form the basis of a temporary regulatory takings claim. This Court should grant the Petition to make clear that state courts are required to adhere to this Court's Fifth Amendment standards when adjudicating all takings claims.

II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE EXTENT TO WHICH, IF ANY, GOVERNMENTAL PLANNING IS IMMUNE FROM SCRUTINY UNDER THE FIFTH AMENDMENT.

This Court should grant the Petition for another important reason as well: To clarify the extent to which, if any, governmental action that is characterized or denominated as "planning" is immune from analysis under the Takings Clause.

Under this Court's regulatory takings jurisprudence, a taking occurs "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original). This rule applies to temporary takings accomplished by governmental regulation, even when the regulation is subsequently rescinded. Id. at 1031 n.17; see also First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 321 (1987). Santini demonstrated at trial that, as a result designation of his property as one of three potential sites for a hazardous waste dump, he "was unable to proceed with residential development, and thus obtain funds from sales to pay down [his] debts . . . ." Petition Appendix ("Pet. App.") at 44a.

The Connecticut Supreme Court, however, immunized the designation of the Santini property as a potential hazardous waste site from scrutiny under the Takings Clause because it held that the designation was "mere" governmental planning. Pet. App. 17a. The court further held that, unless and until the Connecticut Hazardous

Waste Management Service (the "Service") reached a "fixed and irreversible" intent to take Santini's property by eminent domain, there could be no taking notwithstanding that Santini was deprived of the economically beneficial use of his property in the meantime. Id. at 26a-27a. The court concluded that the Service did not have the requisite intent because Santini's property was but one of three potential sites and further study and permits were required before the final selection was made. Id. at 26a. The court regarded the economic idling of the development for two years as simply an incident of ownership that was not compensable. Id. at 23a. The court cited First English, 482 U.S. 304, in support of its holding.[2] Id. The court further held that this Court's other regulatory and temporary takings decisions[3] were not pertinent to its analysis because those cases did not involve "mere planning" by the government. Pet. App. 24a.

The two dissenting justices rejected the "mere planning" rationale. They noted that "houses and radioactive wastes do not mix," id. at 31a, and that it is "inconceivable that a 'Chernobyl Estates' could be a successful real estate development in Connecticut." Id. at 38a. These justices would have held, relying on this Court's temporary and

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2. "Indeed, in *First English Evangelical Lutheran Church*, the court reiterated 'the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and . . . *depreciation in value of the property by reason of preliminary activity is not chargeable to the government.*'" Pet. App. 23a (emphasis in original).

3. Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); and Penn Central Transportation Co. v. New York City, 438 U. S. 104 (1978).

regulatory takings decisions, that

> when, because of the impact on their distinct investment backed expectations, property owners like the plaintiffs are forced to sacrifice all economically beneficial uses of their property, even temporarily, a taking that requires just compensation has occurred.

Id. (MacDonald, J., dissenting); Id. at 32a (Berdon, J., dissenting).

As noted above, the majority and dissenting justices all found support for their positions in decisions of this Court. The majority likened the effect of the hazardous waste designation to an incident of ownership that is subject to alteration without compensation. Pet. App. 23a. This Court has recognized in cases in which the federal government took property by eminent domain, that "[a] reduction or increase in the value of property [that] may occur by reason of legislation for or the beginning or completion of a project" are "incidents of ownership" and are not considered "a 'taking' in a constitutional sense." Danforth v. U. S., 308 U.S. 271, 285 (1939). See also Kirby Forest Industries, Inc. v. U.S., 467 U.S. 1, 15-16 (1984). The majority applied this logic to the hazardous waste site designation.

This Court, however, has also

> frequently recognized that *a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the*

> *meaning of the Fifth Amendment*, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property.

Kirby Forest, 467 U.S. at 14 (emphasis added). In addition, "a land-use regulation that severely interfered with an owner's 'distinct investment-based expectations' might precipitate a taking." Id. See Lucas, 505 U.S. at 1015-1019. This is so because

> while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of the "'advantage of living and doing business in a civilized community,'" some are so substantial and unforeseeable, and can so easily be identified and redistributed, that "justice and fairness" require that they be borne by the public as a whole.

Kirby Forest, 467 U.S. at 14 (citations omitted). The dissenting justices considered the effect of the Service's designation under this analysis.

Amicus submits that it is difficult to see how being designated a potential hazardous waste site through a secret planning process, with the consequent two-year economic idling of a fully permitted ongoing residential development, is a mere "incident of ownership" that the Constitution does not protect. The designation of Santini's development, in which he had already invested millions of dollars, constituted a "radical curtailment of [his] freedom to make

use of or [his] ability to derive income from his land." Kirby Forest, 467 U.S. at 14. The designation, like the regulation at issue in Lucas, put an abrupt end to Santini's reasonable investment-backed expectations. See Lucas, 505 U.S. at 1008.

As this Court has repeatedly recognized:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," . . . , this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-124 (1978) (alteration in original; citations omitted). While the Connecticut Supreme Court has not developed a "set formula" for what constitutes a taking, it has determined that governmental activities that are characterized as "mere planning" are not subject to a Fifth Amendment takings analysis regardless of the impact those activities have on individual property owners. This exclusion of a wide-range of governmental action from

scrutiny would allow creative land use planners and other governmental officials to recast as "planning measures" many regulations and ordinances that would otherwise be subject to the Fifth Amendment.[4] This Court should grant the Petition and reject this categorical exclusion of "mere planning" from Constitutional scrutiny.

CONCLUSION

For the foregoing reasons, and those set forth in Santini's Petition, this Court should grant the Petition.

Respectfully submitted,

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4. For example, the "Beachfront Management Act" which prohibited Lucas from building a single-family home could easily be transformed into the "Sand Dunes Planning Initiative." See Lucas, 505 U.S. at 1007-09. Similarly, the interim flood protection ordinance at issue in First English, 482 U.S. at 307, which could itself have been viewed as a planning device, might be recast as the "Flood Protection Study and Building Moratorium."

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IN THE

SUPREME COURT OF THE UNITED STATES

EVANDRO S. SANTINI, *et al.*,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners Evandro S. Santini and Santini Homes, Inc. hereby reply to the Opposition to Petition for a Writ of Certiorari ("Opp.") filed May 2, 2000, by the Respondent Connecticut Hazardous Waste Management Service (the "Agency").

I.

WHETHER THE CONNECTICUT SUPREME COURT WAS ENTITLED TO BASE ITS ADJUDICATION OF THE PETITIONERS' TAKING CLAIM SOLELY ON STATE LAW GROUNDS, WITHOUT ADHERENCE TO OR CONSISTENCY WITH DECISIONS OF THIS COURT INTERPRETING THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT, IS PRECISELY THE QUESTON PRESENTED IN THIS PETITION.

The Respondent opposes this Petition by observing that the Petitioners pleaded only under the takings clause of the Connecticut Constitution, that their state court complaint does not cite the U.S. Constitution, and that the Connecticut Supreme Court characterized this case as arising only under the state constitution. In light of these facts, the Respondent asserts that the case was decided solely "under the terms of the Connecticut Constitution." Opp. at 2. The Respondent then appears to argue that there is an adequate and independent state ground to support the majority opinion below, *id.* at 3, but it does not discuss or analyze any decisions of this Court discussing what constitutes such as basis for a state court decision.

The Respondent misses the point of the Petition. The Petitioners pled only a state law cause of action because

that is what is required by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Because the Fifth Amendment is not even violated until the property owner has availed itself of state procedures and has been denied just compensation, no court, state or federal, has subject matter jurisdiction over a federal taking claim at the time a property owner initiates a taking claim in a state court. In this case, adhering to *Williamson County*, the Petitioner pursued an available state procedure for seeking just compensation, while presenting to the state courts in their briefs the principle that decisions of this Court interpreting the Fifth Amendment Takings Clause constitute binding authority and furnish minimum standards for the adjudication of their claim. The Respondent does not dispute that the Petitioners expressly argued the applicability of federal constitutional standards at each level of the state court proceedings.[1]

It is true that the Petitioners did not attempt to "reserve" a subsequent federal claim using the procedure outlined in, among other cases, *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 511 (1964). That is because *Williamson County* makes it clear that a federal taking claim is not ripe for adjudication until a land owner has been denied just compensation in the state system. A litigant cannot reserve an unripe claim, *see Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 84, 85 n.7 (1984) (litigant may only reserve a federal

[1] The Petitioners' arguments with respect to minimum federal standards were not in any sense a passing reference in the proceedings below; federal constitutional law was extensively briefed at both the trial and appellate levels by both parties. The Respondent did not dispute in either he trial or appellate court the relevance of federal decisions (and thus, the Connecticut Supreme Court's holding rejecting federal standards was issued *sua sponte*).

claim that could have been brought simultaneously in state court).[2]

The Respondent Agency is simply wrong in its contention that the Connecticut Supreme Court did not decide a substantial question of federal law. In fact, the court below, as appears plainly from the face of the majority opinion, *see* Petition, App. at 17a-19a, nn.19, 20, directly addressed the Petitioners' argument that decisions of this Court furnish minimum standards, and held that such standards were "irrelevant." The majority then proceeded to *assume* that the takings clause of the Connecticut Constitution is equivalent to the Fifth Amendment Takings Clause, thereby sidestepping the extensively briefed issue of whether Connecticut's takings jurisprudence comports with current Fifth Amendment standards. After setting aside federal law, the court below went on to formulate standards that are plainly repugnant to decisions of this Court. *Id.* at 19a-21a.

Where a state court construes state law broadly "in the belief that federal law poses no barrier to the exercise of state authority," this Court "has reviewed the federal question on which the state law determination appears to have been premised." *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 152 (1984), *citing, e.g., Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942). The Questions Presented do not rest upon an adequate, independent state ground, because they address the relationship between state procedures for just compensa-

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[2]Moreover, reservation of a federal taking claim would have been inconsistent with the necessary and proper presentation to the state court of the principle that it must adhere to decisions of this Court interpreting the Fifth Amendment Takings Clause.

tion and the Fifth Amendment Takings Clause, not the meaning of the state procedure in isolation.[3]

II.

RESPONDENT'S ARGUMENT THAT THE PETITIONERS' FACTUAL CLAIMS HAVE BEEN ADJUDICATED OVERLOOKS THE FACT THAT THE MAJORITY OPINION BELOW DECIDED THE CASE AS A MATTER OF LAW BASED SOLELY ON THE NATURE OF THE RESPONDENT AGENCY'S ACTIONS, WITHOUT REGARD TO THE ECONOMIC IMPACT OR THE OWNER'S INVESTMENT-BACKED EXPECTATIONS AS REQUIRED BY THIS COURT'S DECISIONS.

As explained previously, the Connecticut Supreme Court, in the first sentence of its decision, framed the dispositive issue as whether as a matter of law "mere governmental planning" may constitute an inverse condemnation. As a result, the court concluded that "it is not necessary to discuss the plaintiffs' factual claims. . . ." Petition, App. at 17a, n.19. Thus, to the extent that the opinion below discusses factual claims, it does so only in *dictum.*

As stated in the Petition, it is not necessary for this Court to revisit or resolve competing factual claims about economically viable use of the Santini property following the June 1991 radioactive waste facility siting announcement. The gravamen of the Petition is that had the Connecticut Supreme Court analyzed Santini's factual claims using federal constitution standards, its *analysis* would

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[3]Moreover, in *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 159 n.5 (1980), a takings case, this Court considered the mere fact that a takings claim was being litigated as implicating a federal question.

have been markedly different. The court would have analyzed the facts in light of the tests and criteria established in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978), *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). It would not have inquired, as a dispositive issue of law, whether the Agency's actions constituted "mere government planning," and it would not have regarded the existence or absence of a fixed and irreversible "intent" to condemn as determinative.

Resolution of factual issues that arose in the state court proceedings is unnecessary to deciding the Questions Presented in this Petition. The issue is whether the Connecticut Supreme Court violated federal constitutional law by holding that it was not necessary to review the factual underpinnings of the Petitioners' taking claim.

CONCLUSION

For the foregoing reasons and those stated in their March 31, 2000 Petition, including that the decision below is in conflict with both decisions of this Court and those of other jurisdictions, the Petitioners respectfully submit that their Petition for a Writ of Certiorari to the Supreme Court of Connecticut should be granted.

Respectfully submitted,

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